

LAW AND TRADITION IN JUDAISM

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TO THE SACRED MEMORY OF MY WIFE
BLANCHE
WHO EXEMPLIFIED IN HER LIFE THE MORAL IDEALS OF JUDAISM
IN EVERLASTING REMEMBRANCE,
(April 21, 1911 — December 17, 1956).

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PREFACE

I have selected eight minor studies for publication in this book in accordance with the rabbinic maxim מִיִּידִי דְּוֹטֵר מִיִּרְכָּס or as Martial put it, *Edita ne brevibus pereat mihi cura libellis dicatur potius τὸν δ' ἀπαμειβόμενος*.² These represent in a modest way, a small attempt at a sort of philosophy of Jewish religious law from the point of view of *Historical-Traditional Judaism*. It may not be without interest to recall that the founders of the Jewish Theological Seminary of America referred to it as "an institution of learning whose teachings are those of *historical-traditional Judaism*, based on the Bible and interpreted by our sages."³

I am fully aware of the inadequacies of my venture to formulate such a philosophy. I have often thought of Santayana's sage observation, "Science and philosophy cast a net of words in the sea of being happy in the end if they draw anything out besides the net itself, with some holes in it." Furthermore, in the very nature of things repetition was unavoidable in these essays. It is true that Quintilian cites the Roman rule *Bis de eadem re ne sit actio*,⁴ yet I find some justification for reiteration in the doctrine of the school of R. Ishmael that taught that it may be supposed that every reiteration brings something new with it. כֹּל פֶּרֶשָׁה שֶׁנֶּאֱמָרָה וְנִשְׁנִית לֹא נִשְׁנִית אֲלָא בְּשִׁבִּיל דְּבַר שֶׁנֶּחְדָּשׁ בָּהּ.⁵

It would have been much in place to explain what I mean by *Historical-Traditional Judaism*, as it would join together the loose threads in the book. But time and circumstances forbid it. However, I shall at this juncture merely attempt a synoptic

¹ Baba Batra 14b.

² *Epigrams* I.45.

³ *Proceedings of the First Biennial Convention of the Jewish Theological Association*, New York, 1888, p. 9.

⁴ *Institutes of Oratory* 7. 6. 4. Cf. also Wenger, *Roman Legal Procedure*, p. 176, notes 9–10.

⁵ Sotah 3b.

view. As I see it Judaism is essentially a historical religion. The Pentateuch itself is mainly concerned with the historical destiny of Israel. It narrates the history of Israel to the death of Moses. To put matters in their proper perspective, the story commences with the Creation of the world. The Laws of the Torah are unique in the annals of mankind in that they are not grouped together as in any other code of antiquity, as for example, in the Hammurabi Code, but the revelation of the different sections of the law is narrated as historical episodes in Israel's experiences,⁶ or at special intervals in time, as the rabbis themselves have already noted.⁷

The revelation of the Torah to Israel by God is the basic conception of historical Judaism. This presupposes a three-fold doctrine, namely, the existence of God, the revelation of the Torah, and the election of Israel, which the medieval writers considered as a single concept.⁸ This thought is already foreshadowed in Deut. 4.35–40. However, the full implications of each of these three doctrines in traditional Judaism can be fully grasped only in the light of its five-fold tradition.

First, and of overriding significance is the *Halakic tradition* contained in the Pentateuch and the oral law. The study of the Halakah was magnificently promoted in the ancient law schools of Palestine and Babylonia where both its practical aspects and the theoretical sides were thoroughly explored. Hermeneutics, dialectics, and methodology were the chief achievements of the law teachers in the academy. The method of חילוק which is the essence of dialectics (and is equivalent to the Greek *διαλειτουργία* and the Roman *distinctio*),⁹ originated with the Tannaim, was carried to fruition by the Amoraim and formed the staple of Post-Talmudic discussion culminating in modern times in such grandiose works as the נחיצות המשפט and the קצות החושן.

Secondly, is the *ethical tradition*, which is pre-eminent in the

⁶ Cf. for example, Lev. 10.1–7; 24.10–16; Num. 9.6–14; 15.32–36; 27.1–11.

⁷ Gittin 60a, Hagigah 6b, Maimonides, *Hilkot Melakim* IX.1.

⁸ Lauterbach, *Rabbinic Essays*, p. 111.

⁹ "The Romans had already distinguished but so above all had the Greeks, from whom the Romans learnt the art," Schulz, *Roman Legal Science*, p. 63, note 9.

prophets. It is true that the chief ethical rules are already found in the Decalogue, in Leviticus, chap. 19, and in the humanitarian legislation in Deuteronomy, but it was the prophets who protested against the abuse of the moral law. The prophets never derided the ritual as such, but upbraided the self-righteous folk who masqueraded their piety under the false banner of correct ritual behavior. In very deed the prophets were battling against the elemental and primitive forces of human nature, as Santayana put it. "For the Greek as for the Jew, the task of morals is the same: to subdue nature as far as possible to the uses of the soul, by whatever agencies material or spiritual be at hand, . . . opening (the heart) wide at the same time to every sweet influence that may descend to it from heaven."¹⁰

Thirdly is the *theological tradition*. While certain theological doctrines as the destiny of man or the problem of evil occupied the attention of the Torah and the prophets, it is primarily in certain books of the Hagiographa that questions about religious experience became a major concern, such as we find it in the Psalms, Proverbs, Job and Ecclesiastes. The wrestling with these problems was continued by the rabbis and is recorded in the Agada of the Talmud and the Midrashim. The medieval Jewish theologians attempted a system of Jewish theology which was hardly more than a discreet mosaic of discrete rabbinic statements.

Fourthly is the *philosophical tradition* which is distinguished from the theological by its design, namely, its purpose to reconcile Judaism with some foreign system of thought. In the *philosophical tradition* we find 4 Ezra, Aristeas, Wisdom of Solomon, 4 Maccabees, and Philo attempting to harmonize Judaism with Greek thought. In the Middle Ages, Saadia, Maimonides, and their successors aimed at reconciling Jewish doctrine with Greco-Arabic thought.

Fifthly is the *mystical tradition*, which assumes great significance in Geonic times, as is evidenced in the *Hekalot* literature and the *Sefer Yetsirah* and which culminated in the *Zohar* during the 13th century. It is not to be denied that much mystic lore

¹⁰ Santayana, *Character and Opinion in United States*, p. 108.

is embedded in the ancient apocrypha and in the Agada. In later times the influence of Cabala on religious practice penetrated via the שליה, the עמק המלך, and the חמדת ימים.

The *Halakic tradition* is primary and takes precedence over the other traditions when they come in conflict with it. For did not R. Jeremiah say to R. Zera לאו אמינא לך לא חפיק נפשך לבר לבר מהלכתא.¹¹ The reason for the primacy of the Halakah, is that conduct is the only gauge of a person's belief, as Bain observed, "belief is that upon which a man is prepared to act." Nevertheless the Halakic tradition can only be fully understood and observed in the framework of the other four traditions.

Now it is true an immense amount of Jewish acumen and ingenuity have been expended on the study of the Halakah, witness the thousands of tomes of novellae on the Talmud, Responsa, and Codes. But this is a natural expression of Jewish intellectual energy and vigor, especially since the study of the Talmud is a romantic ideal in Judaism.

Judaism has been frequently accused of being a legalistic religion, but this charge is refuted by the prodigious aggregate of theological speculation found in the Agada,¹² רצונך שתכיר מי ש.אמר והיה העולם למוד הגדה שמתוך כך את מכיר את הקב"ה ומדבק בדרכיו. "Do you wish to know God, Who brought this world into being by His mere fiat, study the Agada, for through it you will know God and imitate His ways." The vast number of medieval Hebrew writers who were pre-occupied with the elucidation of purely theological tenets and topics testify to the falsity of the indictment that Judaism is exclusively concerned with ritual and formalism. Judaism indeed stresses the observance of the law because by works is a man justified and not by faith only, רצה הקב"ה לזכות את ישראל לפיכך הרבה להם תורה ומצות, but it by no means minimized theological thinking.

Our greatest medieval theologian, Moses Maimonides, writes, in the *Guide of the Perplexed* (III, 51) as follows: "The highest form of worship of God is only possible after the acquisition of the knowledge of God . . . and man's love of God is proportional

¹¹ Rosh ha-Shanah 13a.

¹² Sifre, Deut. 49.

to his knowledge of Him," העבודה האחרונה לא תהיה אלא אחר . . . ההשגה. והאהבה היא כפי ההשגה. It is noteworthy that Philo designates Moses as the theologian par excellence.

Since in the minds of many, there is apt to be a confusion between religion and theology, let me illustrate the difference by a story told by Henry S. Prichett. A teacher in a chemical laboratory was explaining a common chemical reaction to a class of students. The reaction itself was going on in a retort on the table while he wrote the conventional formula on the black-board to describe the reaction. The instructor wrote by mistake CO_3 instead of CO_2 . But this did not make the slightest difference in the reaction that was going on in the flask. Theology is related to the religion, as the chemical formula is to the chemical reaction, or as the science of botany to the living flower. Religion helps us to feel at home in this world. Theology, concerned as it is with human destiny, the perfection of the individual, and the attempt to get in contact with ultimate reality in terms of personality, helps to make the world more intelligible to us. It is of tremendous significance to us collectively and individually to become clear about and to formulate the thinking of the rabbis of the Talmud with respect to God and man's relation to Him, in a language and terminology that is meaningful for the present.

The new Jewish learning that originated in Germany in the past century, with Zunz, Steinschneider and their illustrious co-workers and successors did much to broaden the intellectual horizon of the Jew. In our own day there is a zealous band of workers in the vineyard of חכמת ישראל doing creative work of great distinction and of lasting significance.

In addition to these works of erudition for the learned, there is a plethora of volumes and articles of an inspirational nature written for the multitude who live in the period of *Jahaliya* (Age of Ignorance of Judaism), with the intention to dispel the confusions incidental to life. Many of these tracts show symptoms of intellectual fatigue. What is sorely needed are adequate syntheses in the domain of Jewish law and ethics, ritual and religion, philosophy and theology, and on other aspects of Judaism. Such writings in which the ideals of Judaism are set forth in a proper perspective would help the Jew at least to live with

the well-nigh insoluble perplexities inevitable in this unprecedented age of rapid change.

When I decided to assemble some essays of mine, it was my wife Blanche זכרונה לברכה who urged me to give priority to these Jewish essays over against my studies in Jewish and Roman Law. The essay on Law and Ethics, which had the benefit of her critical comments, was alas! the last paper that she typed for me, להאי שופרא דבלי בעפרא קא בכינא.

Of the eight essays published herewith, six were delivered at the conventions of the Rabbinical Assembly, and are reprinted with appropriate changes, and two are published here for the first time. The views expressed in this book represent my own convictions, and I accept full responsibility for them. I fully realize how modest my contribution is מתנתי מעומה, but if it will be מוסיף דבקוח בחורה, to borrow an expression from Maimonides, then I shall be amply rewarded.

In conclusion, I wish to thank Rabbi Isaac Klein, President of the Rabbinical Assembly of America; my colleagues in the Rabbinical Assembly of America and on the Executive Council for making possible the publication of this book; and the Board of Rabbis of Philadelphia for the funds made available by the Allied Jewish Appeal.

TOWARDS A PHILOSOPHY OF JEWISH LAW*

Before we begin to ponder the theme for which we have congregated here in these tense and unsettled times, let us turn for inspiration to an ancient Babylonian scholar, R. Hisda, who remarked: 'מאי דכתיב אוהב ה' שערי ציון מכל משכנות יעקב אוהב ה'.¹ What is the significance of the verse: The Lord loveth the gates of Zion more than all dwellings of Jacob. It means that God prefers the places distinguished for Halakah to all the synagogues and schools of learning.²

The famous polymath Azulai was puzzled by this statement. Did not the halakah constitute part of the curriculum of the Beth ha-Midrash? If so, why are the שערים המצוינים בהלכה esteemed more than the academies? Consequently he suggested that there was this difference between the two.³ The Beth ha-Midrash is the place of study of the הלכות לפי פשוטן, i. e. the simple mastery of the details of the law. Whereas the שערים המצוינים בהלכה designate the schools where advanced students probe the deeper and philosophical underpinning of the Halakah מעמיקים בהלכה. ולומדים בעיון נמרץ לעומק של הלכה. The creative synthesis of Jewish Law is thus exalted above and beyond the mere analysis of its particulars.

Even among the Romans, who were disinclined to speculation, we find the familiar saying.⁴ We must philosophize, even though

* An address delivered at the Second Conference on Jewish Law of the Rabbinical Assembly on March 30, 1948, and printed in *Conservative Judaism*, vol. VI, no. 1 (1949), pp. 1-31.

¹ Berakot 8a.

² אין שער אלא 8.3 Deuteronomy Rabbah 8.3, פתח עינים 1, סנהדרין.

³ Quintilian, *Institutio Oratoria*, V, 10.70. Ennius advised to taste of philosophy, but not to gorge one's self upon it, quoted by Cicero, *Disputationes Tusculanae*, II. 1, 1, cf. also the jest of Plautus (*Captivi* 284) apropos of a

we ought not. *Philosophandum est, etiamsi non est philosophandum*. Now the philosophy of law is concerned with such notions as the origin and ends of the law, the principles of interpretation and legislation, the doctrine of legal fiction, the role of equity and the sources of authority in the development of law.

It is true that the mandate of the Rabbinical Assembly called for a discussion centered on the legal problems of matrimony and its concomitant evils. Nevertheless the Committee on Jewish Law felt that it would be indiscreet to dissociate the special problems of domestic law from the remainder of Jewish Law and to isolate the part from the whole, when the latter is so organically tied up with the former. There is a penetrating observation by Celsus, an ancient Roman jurist to which the rabbis would heartily assent. "It is improper either to give a decision or venture an opinion without taking into consideration the entire law." *Incivile est nisi tota lege perspecta una aliqua particula eius proposita iudicare vel respondere*.⁴ This thought undoubtedly underlies R. Yoḥanan's view,⁵ אִיזוֹהוּ תִּלְמִיד חָכָם שֶׁמִּמֶּנִּין אוֹתוֹ פְּרִנָּס עַל הַצְבוּר זֶה שְׁשׂוֹאֲלִין אוֹתוֹ דְּבַר הַלָּכָה בְּכָל מְקוֹם וְאוֹמֵר וְאִפְּיִלּוּ בְּמַסַּכְתָּ כֻּלָּה.

I know full well that the formulation and development of an adequate Philosophy of Jewish Law, if it is to take root in the hearts and minds of our people, cannot be left solely to the initiative of private enterprise, but it must represent the capital summation of group thinking over a period of many years. It is perfectly natural that in a learned assembly such as ours where independent thinking is cultivated, and where intellectual candor and forthrightness are prized as a virtue, there will be deep and wide divergencies of views. However, we must ever be

reckless romancer, that "he is not simply lying low, he is philosophizing." Callicles says that philosophy pursued in moderation is an elegant accomplishment, but too much philosophy is the ruin of human life, cf. Plato, *Gorgias*, 484.

⁴ *Digest*. I, 3.24.

⁵ Shabbat 114a, cf. Bacher, *Die Agada der palastinensischen Amoräer*, I, Strassburg, 1892, p. 238, note 6, and Higger, מסכתות כלה, Brooklyn, 1936, pp. 15-16. Cf. Numbers Rabbah 19.17 (ed. Horeb), כל דברי תורה צריכים זה, לזה שזה נועל וזה פותח ממנין וקנים לדברים יחידים והוא שיהא Y. Hagigah I.8 ראו ללל הדברים.

patient of each other's differences and emulate the conduct of the Beth Hillel⁶ שנוחין ועלובין היו ושונין דבריהן ודברי בית שמאי. We should not forget for a moment that each one of us in our philosophical thinking about the Law is influenced by a complication of factors, by the range and fund of halakic knowledge at our disposal, our intellectual temper and our sense of logic,⁷ as well as by our set of religious values, our emotional attitude,⁸ and our loyalty to traditional tenets.

On this occasion, I shall try my best to indicate the direction towards which we should be heading in our philosophical thinking about Jewish Law. In the very little time which I allowed myself to snatch from my regular duties and studies I was able only to assemble and muster a few desultory observations which I shall present to you for what they are worth. If I have strayed somewhere ואף אמנם שניתי אחי חלין משונה⁹.

We shall initiate our discussion with the elucidation of some historical principles and then pass on to a consideration of their relevance and applicableness to our day. As I understand it, Conservative Judaism is dedicated to the proposition that Jewish Law as embodied in the sacred Scriptures, interpreted in the Talmud, and elaborated in the subsequent halakic writings is binding upon every Jew. However, for valuable intimations for a philosophy of Law,^{9a} we must lean most heavily upon the Talmud, for it is in that great repository of Jewish learning, that the Biblical Law received its classic exposition.

One of the great obstacles to clear thinking on this subject, is the formidable confusion that reigns supreme concerning the

⁶ 'Erubin 13b.

⁷ Cf. F. C. S. Schiller, "In actual fact logical assertion grows up in the jungle of wishes, desires, emotions, questions, commands, imaginations, hopes and fears, which constitute the psychic life of every living person. In real life logical assertion is intimately bound up with this context." *Formal Logic*, London, 1912, p. 9.

⁸ For the emotional attachment to the Law, cf. the explanation of Hananiah Cazes why the Talmud uses the expression חביבא ליה instead of חשיבא ליה, cf. קנאת סופרים to Maimonides, ספר המצות, Warsaw, 1883, 27b.

⁹ Job 19.4.

^{9a} חורת הנביאים by Chajes, Zolkiew, 1836, is the first modern attempt at a philosophy of Talmudic Law.

origin and nature of the Law. Hence a clarification of the rabbinic theory may be of far-reaching significance. According to Pentateuchal teaching,¹⁰ the divine law is complete and immutable. לא חסיפו על הדבר אשר אנכי מצוה אתכם ולא תגרעו ממנו. Some forty times the inspired lawgiver refers to the laws as חקת עולם לדורותיכם.¹¹ The rabbis, for better or for worse, were neither systematic theologians nor metaphysicians, and consequently framed no dogmas and fashioned no systems. Therefore, they never formulated the doctrine of the finality or immutability of the law in dogmatic terms, as Maimonides felt forced to do for polemical purposes in his thirteen principles of belief.¹²

The Scriptural doctrine that the Mosaic Law was final and complete was understood and underscored by the rabbis as

¹⁰ Deut. 4.2 and 13.1, cf. Maimonides, ספר המצות, negative precepts, nos. 313–314, ed. Heller, Jerusalem, 1946, p. 179. *Hilkot Mamrim*, II.9, R. David b. Aryeh Leib, עיר מקלט, Dyhernfurt, 1690, 44b, remarks, וטעם איסור הוספה, כי חורה ה' חסימה בלתי חסרון וכל פעולותיו ומצותיו חסימים ושלמים הם. Cf. Justinian's remark: *Sed quia divinae quidem res perfectissimae sunt, humani vero iuris condicio semper in infinitum decurrit*. Cf. *Constitutio Tanta*, 18. That the Jewish Law is the most perfect, see Pascal, *Pensées*, in the Modern Library Edition, pp. 205, 206.

¹¹ The rabbis did not feel compelled to explain why Scripture repeated in so many individual instances that the law is eternal. Rashi to Ex. 28.43 observes: כל מקום שנאמר חקת עולם הוא נזירה מיד ולדורות לעכב בו. With regard to the Paschal lamb (Ex. 12.14) Rashi remarks: לדורותיכם שומע אני מיעוט דורות. שנים ח'ל חקת עולם תחנהו לפי שלא נאמר דורות. and again in Ex. 12.17, he says: חקת עולם תחנהו חקת על המלאכה אלא על החנינה לכך חזר ושנאה כאן שלא תאמר כל מלאכה לא יעשה לא לדורות נאמרה אלא לאותו הדור. Cf. Mekilta, ed. Horovitz, p. 26. Sifre Numbers 109, on the verse לחקת עולם לדורות comments, שינהו הדבר לדורות, for the parallel passages, cf. ed. Horovitz, p. 112, note 16. On the meaning of עולם in Scripture in these passages, cf. H. M. Wiener, *Early Hebrew History*, London, 1924, pp. 57 ff., cf. also Altman, "Olam and Aion" in *Festschrift Jacob Freiman*, Berlin, 1937, pp. 1–14.

¹² From Sifra (Lev. 9.22, ed. Weiss, 44d) it may be inferred that the laws were to be in force until the time of the resurrection, cf. also Maimonides, Commentary on Mishnah Megillah I.1. That there will be no change in the law in Messianic times, cf. Maimonides, *Hilkot Melakim*, XI.3, and his commentary to M. Sanhedrin I.3, ed. Weisz, Halle, 1893, p. 4. In his introduction to the Mishnah he remarks that even a prophet like Elijah cannot change a law, as בל חוסיף is still in force, ed. Bamberger, Berlin, 1903, pp. 18–19.

referring to the written law preserved in the Pentateuch. They whittled down the original intent of **בל תוסיף** by limiting its prohibition to add to a particular precept of Scripture,¹³ e. g. one may not increase the number of fringes, or the species accompanying the Lulab, or put on phylacteries on the Sabbath according to the authority who held **לאו זמן תפילין**.

On the other hand, the rabbis forestalled any objections that ancient enactments or interpretations were an infringement upon the Biblical precept of **בל תוסיף** by propounding the view that they were part of the oral tradition revealed to Moses on Sinai,¹⁴ and they could point to the Pentateuch itself for allusions¹⁵ to

¹³ Cf. Sifre Deuteronomy 82 (ed. Finkelstein, p. 148), Nahmanides to Deut. 4.2, Tosafot, Hagigah 8b, s. v. חזר, 'Erubin 96a. For Philo's interpretation, cf. *Spec. Leg.*, IV.27, 144, and Wolfson, *Philo*, II, 273–274. Cf. also Mekilta, ed. Horowitz, p. 241. For a full discussion of the doctrine of **בל תוסיף**, cf. Mordecai Surnaga, **קונטרס בענין בל תוסיף**, at the end of Jonah Nabon's **נט מקושר**, Leghorn, 1785, and Saul Halevi, **כלילת שאול**, Vilna, 1879, pp. 96–101, and Chajes in his **תורת הנביאים**.

¹⁴ The *Agraphos Nomos* played a much more important role in Greek jurisprudence (cf. R. Hirzel, *Agraphos Nomos* and Heinemann, *HUCA*, IV, 149–171) than the *lex non scripta* did in Roman jurisprudence (cf. the literature cited by J. Himmelschein in *Symbolae Friburgenses in honorem Ottonis Lenel*, 1932, p. 395, note 2, and p. 392, note 2, and Schulz, *Roman Legal Science*, Oxford, 1946, p. 73, note 5 and p. 137), but the oral tradition was of overwhelming importance in Jewish law until the end of the Talmudic period. For the question whether the Mishnah was written down, cf. J. N. Epstein, **מבוא לנוסח המשנה**, Jerusalem, 1948, pp. 692–705. Hence we find R. Abin, a Palestinian Amora of the 4th century remarking (Y. Hagigah I.8, 76d) **מה בין לאומות אלו מוציאים ספריהן ואלו מוציאים ספריהן אלו מוציאים דפחריהן ואלו מוציאים דפחריהן**. As far as the law is concerned both Jews and Gentiles can produce a written code, both brought **ספריהן** and **דפחריהן**, implying that the Gentiles do not possess an unwritten law. R. Abin's observation is correct for in his days the Roman provincial law was completely a written code, Bacher, *Die Agada der Palästinenensischen Amoräer*, III, 412, note 3, missed the point of this passage, for **דפחור**, cf. R. Eisler, *Journal of the Royal Asiatic Society*, Jan., 1923, p. 71, and Blau, *Studien zum althebräischen Buchwesen*, Budapest, 1902, pp. 19–20.

¹⁵ Thus from **תורה** in Lev. 26.46 a Tanna derived the following **מלמד ששתי** **תורות ניתנו להם לישראל אחד בכתב ואחד בעל פה** (Sifra, ed. Weiss, 112c). In the words **שהראוהו** R. Yoḥanan found an allusion to the fact **ועליהם ככל הדברים** (Megillah 19b), **למשה דקדוקי תורה ודקדוקי סופרים ומה שהסופרים עתידים לחדש**

this תורה שבעל פה. This claim was rejected first by the Sadducees and later by the Karaites.

Historically speaking, this was an immense achievement on the part of the rabbis. First, because it ruled out a narrow interpretation of תורה שבעל פה which would have interfered with the normal development of Jewish Law, which was certainly not intended by the inspired lawgiver. Secondly, it vouchsafed enormous prestige and sanction to the unwritten law.¹⁶

whereas R. Joshua ben Levi interpreted this same verse to mean, אמילו מה שחלמיר ווחיק עתיד להורות לפני רבו כבר נאמר למשה מסיני (Y. Hagigah I.76d). However Resh Lakish found in Ex. 24.12 an intimation to the fact that the entire Bible as well as the Mishnah and Talmud נתנו למשה מסיני (Berakot 5a). The views expressed by the rabbis resemble the doctrine of analytical jurisprudence which assumed that "a body of enacted law might be made so complete and so perfect that the judge would have only to select the exact precept made in advance for the case in hand, and then mechanically apply it" (Pound, *Law and Morals*, 1926, p. 46). As to the extent of the law revealed on Sinai there is a controversy between R. Ishmael and R. Akiba, the former believed that only general rules were given to Moses on Sinai, and the particulars later in the Tent of Meeting, whereas R. Akiba held that both were vouchsafed to Moses (Hagigah 6a, and parallels, cf. also Exodus Rabbah 41.6 and Friedmann, in *Bei Talmud*, vol. II, pp. 8 ff.)

¹⁶ The oral law as conceived by the rabbis consisted partly of interpretation (מדרש or פירוש) of the written law, rules of law not alluded to in Scripture (הלכה למשה מסיני) and the hermeneutical principles מדרש שהתורה נדרשת בהן. Thus with respect to the verse ומי יודע משר דבר (Eccl. 8.1) we read that God was the first interpreter of the law, וזה הקב"ה שפירש התורה למשה (Pesikta Rabbati, 61b, Tanhuma Hukkat 16) and Moses followed suit, משה פירש התורה לישראל (Pesikta Rabbati 63a). Elsewhere we read that the Torah as revealed on Sinai embraced הלכותיה ודקדוקיה ופירושה (Sifra, ed. Weiss, 112c). According to another view, Israel was not punished for violating any provision of the law until it had been interpreted in the Tabernacle, לא נענשו עליה עד שנחפרשה (Canticles Rabbah 2.3). According to Maimonides the chief feature of the oral law is interpretation, כל המצוות שניתנו לו למשה בסיני בפירוש, נתנו שנאמר ואתנה לך את לחת האבן והתורה והמצוה תורה זו תורה שבכתב והמצוה זו פירוש. וצונו לעשות התורה על פי המצוה ומצוה זו היא הנקראת תורה שבעל פה. Cf. Introduction to the *Mishneh Torah* at the beginning. Cf. Ibn Ezra to Ex. 24.12 and Berakot 5a. A person familiar only with texts was termed a learned man, קרא ושנה, whereas a scholar was one who could interpret them, קרא ושנה חכם, ולא פירש חכם, (Derek Erets Zuta X, end). A given text was capable of many interpretations, שידועים לפרש את התורה מ"ט פנים (Tanhuma Hukkat 18 (in the parallel passages the reading is שידועים לפרש את התורה מ"ט פנים). The interpretation must

As for the second point, namely, the Talmudic theory of the immutability of the law, we can best assess the significance this doctrine possessed for them by studying the manner in which they dealt with Biblical statutes and ordinances. It is important to recall that the rabbis, who entertained an unshaken belief in the literal inspiration of the Pentateuch,¹⁷ stressed the principle

always have some basis in the Scriptural verse, as R. Judah b. Ilai says that the rebellious elder is subject to the penalty of the law only with respect to a דבר שעיקרו מדברי תורה ומירושו מדברי סופרים (Sanhedrin 87a) and Abaye informs us that the signs of clean and unclean birds are a matter of rabbinic interpretation, לא נאמר מירושן מדברי תורה אלא מדברי סופרים (Hullin 61a). Furthermore, interpretation is often designated as מדרשות, note especially the observations in Sifre Deuteronomy 59 and the parallel passages and Hoffmann, *Zur Einleitung in den halachischen Midraschim*, p. 4, note 4. For the rules revealed on Sinai, known as למשה מסיני, cf. Bacher, *Tradition und Traditionen*, Leipzig, 1914, pp. 33–46. Some of the hermeneutical principles were considered to be of Sinaitic origin, cf. Rashi to Niddah 19b. The statement of Tosafot, Shabbat 97a, s. v. נזירה seems to be based upon Sifre Deuteronomy 313, cf. also Sanhedrin 99a and Y. Sanhedrin X.1, also Blau, *R. E. J.*, 36:151, note 1. Joel first pointed out that there were parallels to the hermeneutical principles in the *Institutes* of Gaius, cf. *Blicke in die Religionsgeschichte*, I.39. According to the Roman concept, the XII Tables were considered the work of the human spirit, cf. Voigt, *Geschichte und Allgemeine Juristische Lehrbegriffe der XII Tafeln*, Leipzig, 1883, I, p. 43.

¹⁷ The view is current throughout rabbinic literature where it is presupposed that every verse, every word and even every letter is literally inspired, cf. Sanhedrin 99a, Y. Sanhedrin X.1, Genesis Rabbah VIII.8, ed. Theodor, p. 61, Sanhedrin 107a, Deissmann, *Bible Studies*, Edinburgh, 1901, pp. 112–114, and Joel, *Blicke in die Religionsgeschichte*, II, pp. 176–177. The view that parts of the Pentateuch were not literally inspired can be traced to Abaye who observed (Megillah 31b), קללות שבמסנה תורה . . . משה מפי עצמן אמרן, whereupon Tosafot remark הקדש וברוח הקדש, cf. also Zohar III.261a, וזכר יצחק, Jerusalem, 1949, p. 3.

For the distinction between Deuteronomy and the rest of the Pentateuch, cf. the statement of R. Joseph דרש סמוכין בעלמא במסנה תורה (Yebamot 4a). Abaye's view would seem to be in conflict with the Sifre, אמר כל התורה אמר מפי הקב"ה ודבר זה משה מפי עצמו אמרו זה כי דבר ה' בזה (Sifre Numbers 112, ed. Horowitz, p. 121). With respect to I Chron. 28.19, where it is said that David received the pattern of the future Temple in writing from the hand of the Lord, the rabbis comment as follows, מיד ה' משה כתב ספרו (Y. Megillah I.1). It is possible that the statement ופירש בלעם (Baba Batra 14b) seems to imply that the chapter on Balaam was not literally inspired, otherwise why would it be mentioned separately. For

that the Scriptural text never lost its natural meaning, no matter what other additional interpretations were imbedded or implicated in it. This theory certainly underlies the familiar statement *אין מקרא יוצא מידו פשוטו*.¹⁸

Now it may be argued that the rabbinic concept of *Peshat*¹⁹ is somewhat at variance with present notions, in view of the greater supply of philological knowledge, historical erudition, and archaeological data available to the modern student. Granted that this is true, still the rabbis evinced very often the possession of a sense for *Peshat* which coincides with our own. This need not surprise us, for access to *Peshat* is gained by following the ordinary and apparent sense of the words in obedience to the dictates of grammar and the laws of syntax. Now the rabbis, to whom our sacred tongue was a living language, possessed an excellent sense for Hebrew,²⁰ and a fine knowledge of the laws of its forms of speech, in spite of the fact that the rich materials of comparative linguistics were not at their disposal.

What is of great interest to us is the role that *Peshat* played in the interpretation of the Halakah. It stands to reason that the personal inclinations and temperament of the individual Tannaim and Amoraim determined to a large extent whether *Peshat* played a major or minor role in their interpretation.

medieval interpretations of this Talmudic passage, cf. Lieberman, הלכות, הירושלמי להרמב"ם, p. 22, and the sources quoted by Strashun to Baba Batra, *loc. cit.* Veiled doubts were held in some quarters about the literal inspiration of the Pentateuch which the rabbis were compelled to silence. This is reflected in the reputed colloquy between the angels and the Deity. When the former uttered their suspicions that Moses might write his own ideas into the Torah, *אחא נותן רשות למשה לכתוב מה שהוא מבקש*, the latter replied that Moses would not do so, but even if he did, it would reflect the divine will, *חס ושלום שמשא עושה*. *אח הדבר הזה ואפילו עושה נאמן הוא שנ' ובכל ביתי נאמן הוא* (Exodus Rabbah 47, end).

¹⁸ Cf. Shabbat 63a, Hullin 6a, 133a and 'Arakin 8b.

¹⁹ Cf. Eisenstadt, *Ueber Bibelkritik in der Talmudischen Literatur*, Frankfurt a./M., 1894, and L. Dobschütz, *Die einfache Bibeldexegese der Tannaim*, Halle, 1893, and S. Rosenblatt, *The Interpretation of the Bible in the Mishnah*, Baltimore, 1935.

²⁰ Cf. S. Gross, *Menahem ben Saruk, Ein Beitrag zur Geschichte der hebräischen Grammatik*, Breslau, 1872, pp. 1-9. Berliner, *Beiträge zur Hebräischen Grammatik*, Berlin, 1879, and review by Goldziher, *Z. D. M. G.*, 34 (1880), 375-384.

We owe to R. Yoḥanan the preservation of the following view of R. Ishmael: בשלשה מקומות הלכה עוקבת מקרא: (Sotah 16a). In three instances in accordance with an ancient tradition do we by-pass the literal meaning of Scripture. Namely, התורה אמרה בעפר והלכה בכל דבר התורה אמרה בתער והלכה בכל דבר התורה אמרה בספר והלכה בכל דבר. We may not safely assume that R. Ishmael fathered the thought that elsewhere *Peshat* regularly prevailed. We need to refer here only to two instances to prove the contrary. With regard to the *Lex Talionis*, the Mekilta²² reports עין תחת עין אתה אומר ממון או אינו אלא עין ממש היה ר' ישמעאל אומר הרי הוא אומר מכה בהמה ישלמה ומכה אדם יומת הקיש הכתוב נוקי אדם לנוקי בהמה ונוקי בהמה לנוקי אדם מה נוקי בהמה לתשלומין אף נוקי אדם לתשלומין. R. Ishmael overrides the literal interpretation of the Ex. 21.24 by the application of the principle of juxtaposition (הקיש). According to this method of reasoning the deliberate placing of two rules in contiguity is designed to instruct us that a common principle united them despite the fact that the literal phrasing of the text seems to disclose something even to the contrary. Now since Scripture (Lev. 24.21) ordains that injuries done to animals are redressed by compensation, the same rule must apply to torts against persons which are mentioned in the same verse.²³

With respect to the Scriptural rule that a burglar may be slain with impunity at night, but not during the day-time²⁴ (Ex. 22.1–2), R. Ishmael observes as follows:²⁵ אם זרחה עליו

²² Cf. Sotah 16a. Here Halakah means an ancient tradition, as Rashi says, הלכה למשה מסיני in contradistinction to a rabbinical interpretation based on one of the hermeneutical principles.

²³ Ed. Horovitz, p. 277. On הקיש cf. Rashi to Baba Kamma 63b, s. v. היקש הוא.

²⁴ This is a good illustration of how R. Ishmael interpreted the spirit of the law rather than its letter. The introduction of the principle of היקש was purely formalistic, as is evident from three examples cited in his name in the Mekilta, p. 293, ed. Horovitz, cf. note 27. Cf. Daube, *Studies in Biblical Law*, Cambridge, 1947, pp. 110 ff.

²⁵ The ancient Biblical law corresponded to the law of the Twelve Tables, VII.12, as was already noted by the author of the *Collatio*, VII.3.2, cf. Boaz Cohen, *Civil Bondage in Jewish and Roman Law*, p. 7, note 25.

²⁶ Mekilta, ed. Horovitz, p. 293. For the ancient notion that the sun dis-

ר' ישמעאל אומר וכי השמש עלי²⁶ בלבד זרחה והלא על כל העולם כל זרחה אלא מה שמש שלום בעולם אף זה אם ידוע הוא שבשלום עמו ודרגו הרי זה חייב. R. Ishmael's interpretation, which is clearly a deviation from the literal sense of the text, involves a modification of the Biblical law,²⁷ namely, that a burglar may be slain with impunity by day or by night, but only if the thief had homicidal intentions, otherwise there would be a charge of murder.²⁸

Neither need we take at its face value the statement of Raba concerning the strict adherence to *Peshat* in Tannaitic interpre-

covers hidden crimes, cf. Cumont, *After Life in Roman Paganism*, New Haven, 1923, p. 130.

²⁶ R. Ishmael's interpretation of the unusual phrase "if the sun shone upon him," reminds one of the observation of Macrobius (*Saturnalia* I.4.19) and Aulus Gellius (*Noctes Atticae* VIII.1) of the singular use of the term *nox* for *noctis* in the Twelve Tables, *Si nox furtum factum sit, si im occissit, iure caesus esto*. If one has slain a nocturnal thief, this homicide is justifiable.

²⁷ The principle underlying R. Ishmael's interpretation is one of spirit versus letter. This becomes patent when we consider the two other examples cited in his name in this very context. Similarly, "they shall spread the sheet" (Deut. 22.17) signifies, they shall make the matter clear as a white sheet. Similarly, "upon his support" (Ex. 21.19) denotes, restored to health. While the principle of spirit versus letter is a fundamental proposition in Talmudic hermeneutics, it has not received a definite and official formulation. The statement *זה אחד משלשה דברים שהיה ר' ישמעאל דורש בחורה כמין משל* (Mekilta to Ex. 2.19, Sifre Deuteronomy 237) should be translated: This is one of the three instances in the Torah, where R. Ishmael interpreted the law according to its spirit, in opposition to R. Eliezer ben Jacob who insisted upon the letter *דברים ככתבן שמה ממש* (Ketubot 46a). In connection with the rule concerning the giving of carrion to a *Ger* and selling it to a foreigner (Deut. 14.21), there is a controversy between R. Judah who adheres to the literal meaning of the verse *דברים ככתבן* and R. Meir who interprets it more freely, and according to its spirit (Pesahim 21b, Sifre Deuteronomy 104, ed. Finkelstein, p. 163). Cf. Boaz Cohen, "Letter and Spirit in Jewish and Roman Law," in *Kaplan Jubilee Volume*, 1953, pp. 109-135.

²⁸ R. Ishmael's view agrees partly with the law of the XII Tables, VIII.13, which permitted a thief to be killed by day only if he used a weapon and the killer shouted aloud so that some persons may hear and come out, for the rule concerning shouting, cf. also Deut. 22.24, 27. Some hold that the requirement of shouting at night is later than the XII Tables, cf. Thayer, *Lex Aquilia*, Cambridge, 1929, p. 56 and H. F. Jolowicz, *De Furtis*, Cambridge, 1940, pp. LXXIV-LXXV. For the canon Law, cf. S. Kuttner, in *Acta Congressus Juridici Internationalis*, III, Rome, 1936, p. 230.

tation, יקום על שם אחיו המת לנחלה אע"ג דבכל התורה כולה אין מקרא יוצא מידי פשוטו הכא אתאי גזירה שוה אפיקתיה לגמרי ואי לא גזירה שוה הוה אמנא שם שם ממש. According to Raba, *Peshat* was always a decisive factor in halakic exegesis, with the single exception where the Tannaim interpreted freely the Biblical phrase יקום על שם אחיו as referring to inheritance.²⁹

Similarly, we maintain the same mental reservations with respect to the anonymous remark, בשלמא רבי עקיבא דמתניתין, לא אתיא גזירה שוה ומפקא לקרא מפשטיה לגמרי אלא רבי עקיבא דברייתא. What should not be overlooked in these two passages is the fact that the application of the hermeneutical principle of גזירה שוה is in direct opposition to the literal meaning of the text.

The rabbis did protest too much their devotion to *Peshat* since we know that they did depart from the natural construction of the text. There can be no question but that the rabbis were conscious of this fact.³¹ Otherwise, we would be impugning their knowledge of Hebrew. They were skilled jurists with all the implications that this epithet carries, and they employed all the art and artifices at their command to make the Bible a living law in their day.³² What is most important for us is to discover

²⁹ Yebamot 24a.

³⁰ Ketubot 38b.

³¹ Out of the innumerable examples available, we mean to cite merely one instance. In Shebuot 30a, we read הכחוב מדבר אחא אומר ועמדו שני האנשים בעדים הכחוב מדבר אחא אומר ואינן בעדים או אינו אלא בבעלי דינין כשהוא אומר אשר להם הריב הרי בבעלי דינין אומר הא מה אני מקיים ועמדו שני האנשים בעדים הכחוב מדבר. That the rabbis knew full well that this was not the *Peshat*, may be gathered from the next comment of the Talmud, וכי חיטא מדלא כתב ואשר להם הריב כוליה קרא בבעלי דינין משחעי. Hence it is incorrect to maintain that the rabbis were unconscious of the fact that they were changing the letter of the law, and consequently in our day, the task of interpreting the law is more difficult if not impossible, because we, who are presumably conscious of what we are doing, cannot pretend to be performing an unconscious act. Cf. also the remark והא קראי לאו הכי כחיבי, Baba Kamma 111b.

³² There is a rich literature on legal hermeneutics among the Romans, cf. especially Stroux, *Summum ius summa Iniuria*, 1926, Lanfranchi, *Il Diritto nei retori romani*, Milan, 1938, and Voigt, *Das Jus Naturale*, III, 279-294. For comparisons between Jewish and Roman legal hermeneutics, cf. Joel, *Blicke in die Religionsgeschichte*, I, Breslau, 1880, p. 39, note 1, Blau, *R. E. J.*, 36, 1898, p. 153, and Daube, *Law Quarterly Review*, 52 (1936), pp. 265-266, and Lieberman, *Hellenism in Jewish Palestine*, New York, 1950, p. 62.

the reasoning processes, the rationalizations and motivations that are concealed in their seemingly peculiar and artificial exegesis.

I should like to mention one example in order to show how the rabbis dealt with a Biblical text that must have produced in them some moral and emotional conflicts. I am referring to the *Lex Talionis*. That the rabbis were aware of the *Peshat* of the ancient text demanding an eye for an eye, we learn from Baba Kamma 83b. אמאי עין תחת עין אמר רחמנא אימא עין ממש. The Talmud enumerates various attempts to rule out the stark and bleak meaning of the verse. Most interesting is the rationalization of R. Dostai ben Judah, עין תחת עין ממון אחת אומר ממון או אינו אלא עין ממש אמרת הרי שהיתה עינו של זה גדולה ועינו של זה קטנה האין אני עין תחת עין תחת בה עין תחת עין (Baba Kamma 83b). R. Dostai tries to show, that it would be fallacious to take the text literally, and resorts to a device, dear and familiar to the logicians who are intent upon making propositions appear preposterous by propelling them to their logical and extreme conclusions.

What is most curious about R. Dostai's manner of reasoning, is that it appealed to an educated Greek philosopher of his time. Indeed Aulus Gellius^{32a} tells of a most interesting colloquy between the Roman jurist Sextus Caecilius³³ and the Greek sophist Favorinus, concerning the merits of the Twelve Tables. Favorinus remarked that he had read the XII Tables and found some of the laws to be very obscure or very cruel and on the other hand, too mild and lenient, and by no means to be taken exactly as they are written. Then he refers to the *Lex Talionis* of the Romans which he quotes: "If one has broken another's limb, there shall be retaliation, unless a compromise be made."³⁴

^{32a} *Noctes Atticae* XX.1.

³³ According to Roby, this scholar is Africanus who is quoted in the *Digest*, cf. his *Introduction to the Study of Justinian's Digest*, Cambridge, 1884, pp. CLXX-CLXXI, and Krüger, *Geschichte der Quellen und Literatur des Römischen Rechts*, Leipzig, 1912, p. 194, note 26. Africanus was noted for the obscurities of his legal expressions, cf. Cicognani, *Canon Law*, Philadelphia, 1935, p. 611.

³⁴ This statement was known to Josephus, cf. Boaz Cohen, *J. Q. R.*, N. S. 34, pp. 412-413.

Now not to mention the cruelty of the vengeance, the exaction of even a just retaliation is impossible. For if one, whose limb has been broken by another, wishes to retaliate by breaking a limb of his injurer, can he succeed, pray, in breaking the limb in exactly the same manner?"^{34a}

The method in which R. Dostai deprived the text of its literal meaning is of profound interest to the student of the history of the interpretation of Scripture, and of Tannaitic logic, but the repudiation of *Peshat* is a significant piece in the story of the intersection of Jewish law and morals.

It would take us too far afield to enter into further details pertaining to the niceties of rabbinic interpretation.³⁵ Suffice it to say that we must laud and applaud the rabbis for their exhibition of a remarkable ingenuity and resourcefulness in making the Scriptures a living source of inspiration for Jewish law and ritual, for manners and morals.³⁶

May I just adduce two passages which will explain what role the rabbis ascribed to themselves as expositors of the Law. In the *Yerushalmi*³⁷ we read as follows: חתנה תורה חתוכה: א"ר ינאי אלו נתנה תורה חתוכה: לא היתה לרגל עמידה. מה טעם וידבר ה' אל משה אמר לפניו רבונו של עולם הודיעני היאך היא ההלכה אמר לו אחרי רבים להטות רבו המזכין וכו' רבו המחייבין חייבו כדי שתהא התורה נדרשת מ"ט פנים טמא ומ"ט פנים טהור מנין ודגלו. If every rule of law in the Torah had been settled in

^{34a} Cf. *Guide of the Perplexed*, III.41.

³⁵ The Tannaim divided the laws derived by interpretation into three classes (1) laws which hover in the air without support. (2) laws like mountains suspended on a hair, (3) rules which have support in Scripture, M. *Hagigah* I. 8, *Tosefta* I.9, *Tosefta*, 'Erubin, end, and *Tosafot*, *Hagigah* 10b, s. v. מעילות, cf. also the statement of R. Jonathan, שמכו למקרא סמכו, ובשעה שאסרו למקרא סמכו, Y. *Shebi'it* I.1 and the *ירושלמי*, *ad loc.*

³⁶ Cicero also says that the *praetor* was *iuris civilis custos esto* (*De Legibus* III.3.8), cf. also Greenidge, *The Legal Procedure of Cicero's Time*, p. 22, note 3.

³⁷ *Sanhedrin* IV.2 (22a) and *Midrash Tehillim* 12 (ed. Buber, pp. 107–108). For the principle in Roman Law that the majority rules, cf. Ulpian, *Refertur ad universos, quod publice fit per maiorem partem*. (*Digest* L.17.160.1) and Scaevola, *Quod maior pars curiae effecit, pro eo habetur, ac si omnes egerint* (*Digest*, L.1.19). Cf. also Otto von Gierke, "Ueber die Geschichte des Majoritätsprinzips" in *Essays in Legal History*, edited by P. Vinogradoff, Oxford, 1913, pp. 312 ff.

about progressive societies, Sir Henry Maine remarked "it may be laid down that social necessities and social opinion are always more or less in advance of law Law is stable; the societies we are speaking of are progressive A general proposition of some value may be advanced with respect to the agencies by which Law is brought into harmony with society. These instrumentalities seem to me to be three in number: Legal Fiction, Equity, and Legislation. Their historical order is that in which I have placed them."⁴²

A legal fiction is any assumption which conceals the fact that the rule and spirit of law have been changed by preserving the letter of the law intact. The illusion is that the law remains what it always was.⁴³

It is perfectly natural that the rabbis who accepted in principle the theory of the immutability of the Law, should find legal fiction particularly congenial to them as a technique for overcoming the inflexibility of the law. Not only a vast part of Rabbinic interpretation, but also the *Responsa Prudentium* of the Romans and the Case-Law of the English, rest on Fictions.^{43a} When the Amoraim designated certain interpretations of the

chapter XVII. Note, however, the remarks of the celebrated Belgian scholar Laurent who observed: "En apparence, le Mosaisme est une théocratie, . . . En réalité, la constitution est moins une théocratie que l'union, la confusion de l'ordre religieux." *Histoire du Droit des Gens et des Relations Internationales*, Bruxelles, I, (1861), p. 369, cf. also G. Levi, *Sulla teocrazia mosaica, Studio critico et storico*, Florence, 1863.

⁴² *Ancient Law*, London, 1924, p. 29. Cf. also Radin, *Roman Law*, p. 32, and Walton, *Historical Introduction to Roman Law*, 1916, 3rd ed., pp. 110-111.

⁴³ On legal fiction, there is a vast discussion by juridical writers, cf. especially, Ihering, *Geist des römischen Rechts*, vol. III, 3rd ed., Leipzig, 1877, pp. 293-301, Tourtoulon, *Philosophy in the Development of Law*, New York, 1922, R. Dekkers, *La Fiction juridique, Étude de droit romain et de droit comparé*, 1935, Riccobono, *Diritto Romano e Diritto Moderno*, 1925, pp. 5 ff., and Vaihinger, *The Philosophy of As If*, London, 1935, pp. 33-35, 143-145. For legal fiction in Jewish Law, cf. Askowith, in *Jewish Studies in Memory of Israel Abrahams*, New York, 1927, pp. 7-11, Zuri in ספר היובל לכבוד בנימין מנשה לוי, Jerusalem, 1940, pp. 174-195, and Atlas, in ספר היובל לכבוד לוי ניצבור, New York, 1946, pp. 1-24.

^{43a} Cf. R. W. Lyman, "Roman *Responsa Prudentium* and English Case Law; their Resemblances and Differences," in *Dickinson Law Review*, 25 (1921), 153-186.

Tannaim as אסמכתא, they were, to all intents and purposes, describing them as legal fictions.

Equity, may be defined as the principle of fairness and justice which was consciously introduced into the body of the law to remedy existing evils or injustice, or to overcome some of the impediments to justice. In Jewish Law, equity designates the principle of natural justice, as *aequitas* sometimes does in Roman Law.⁴⁴ The rabbis found an allusion to the doctrine of equity in the verse ועשית הישר והטוב and deduced from it the principle of משום ענווה הקילו בה רבנן⁴⁵ and such rules as דינא דבר מצרא⁴⁶ and משום ענווה הקילו בה רבנן⁴⁷ and דרכי שלום.⁴⁸

As for legislation, we find that the rabbis never arrogated to themselves legislative power, in the sense that they or any one else had the right to repeal a Biblical law outright.⁴⁹ The numerous changes, modifications, and innovations⁵⁰ introduced

⁴⁴ Cf. Voigt, *Das Jus Naturale, Aequum et Bonum und Jus Gentium der Römer*, vol. III, Leipzig, 1875, pp. 399 ff, Buckland, *Text-Book on Roman Law*, p. 55, and U. Alvarez, *Horizonte actual del Derecho romano*, p. 203, note 116.

⁴⁵ Cf. Baba Metsia 108a, cf. also R. Pescione, *La Prelazione nel diritto romano et greco-romano*, 1929, and Ostrogorsky, "The Peasant's Preemption Right," in *Journal of Roman Studies*, 37 (1947), pp. 117-126.

⁴⁶ This principle is deduced from Ex. 18.20, cf. Baba Metsia 30b, and Güdemann, *M. G. W. J.*, 61, 422-443.

⁴⁷ M. Gittin V.8-9, Tosefta, V.4-5, ed. Zuckermann, p. 328. The rules enacted for the welfare of society מפני חקון העולם do partly belong to this category.

⁴⁸ Cf. Yebamot 88a, Ketubot 3a.

⁴⁹ Maimonides in his *Iggeret Teman* writes as follows: "Any prophet, no matter what his pedigree is, be he priest, Levite, or Israelite, is perfidious even if he asserts that only one of the precepts of the Torah is void, in view of the Mosaic pronouncement 'unto us and unto our children forever' (Deut. 29.28)." (Cf. English translation by Boaz Cohen of the Arabic original, ed. New York, 1952, pp. X-XI). For the problem of authority in Roman Law, cf. Fritz von Schwind, *Zur Frage der Publication im Römischen Recht*, Munich, 1940, pp. 128 ff.

⁵⁰ With regard to חידוש we find conflicting data in the Talmud. Thus we read מעשה דבר משה (Shabbat 104a), and we find that R. Eliezer never uttered anything but what he heard from his teachers. (Tosefta, Yebamot III, end, p. 244). In Hagiga 3a we are informed אי אפשר חידוש לבית המדרש בלא חידוש and in Shabbat 135a, Baba Batra 110b there is the interesting observation הלכה ונתחדשה, cf. also Y. 'Erubin V.22c,

by them, whether they were *Takkanot*⁵¹ as the *Prosbol* of Hillel, or interpretations, rest mostly on legal fiction. The enactments of the Rabbis, which are in a certain sense, a species of legislative activity, were limited to supplementing and enforcing Biblical Law as they understood it. It should not be forgotten that in ancient times, legislation played a very minor role. To quote Maine once more: "There is abundant proof that legislative and judicial power are not distinguished in primitive thought, nor again is legislation associated with innovation. In our day, the legislator is always supposed to innovate, the judge, never. But of old, the legislator no more necessarily innovated than the judges. He only, for the most part, declared pre-existing law on custom."⁵²

What bearing has this historical exposition upon our present problems and maladjustments? There is no need at this late date to depict to you in mournful numbers the melancholy and whim-

מה הלאכה. שער חדש ששם חדשו סופרים את ההלכה. According to R. Yoḥanan, Moses learned on Sinai not only the details of the Law and its interpretation but also מה מזה (Megillah 19b). When R. Jose visited his teacher R. Eliezer in Lydda, he was asked by him מה חירוש היה בבית המדרש היום. Whereupon he replied, "It was voted and decided that the Tithe for the Poor must be given in Ammon and Moab on the Seventh Year." (M. Yadayim IV.3, Tosefta, II.16). Cf. Deuteronomy Rabbah I.10 (ed. Horeb): מה הלכות חדש. In a recent article in *The Scientific Monthly*, entitled "Man's Control Over Civilization: An Anthropocentric Illusion," Prof. L. A. White wrote: "If we are not able to perform such tiny and insignificant feats as eliminating the *b* from *lamb* or modifying our calendar, how can we hope to construct a new social order on a world-wide scale?"

⁵¹ A. Freimann has called attention to the fact that the threefold form of government, the judicial, legislative, and executive are foreshadowed in Isa. 33.22, מלכנו ה' מחוקקנו ה' שופטנו ה' כי ה' cf. his article "דרכי החקיקה בישראל" in *Jerusalem*, 1946, vol. I, p. 41. Aristotle in his *Politics*, IV. 11-13, (ed. Loeb Classics, p. 344) already discussed these three branches of government.

⁵² *Lectures on the Early History of Institutions*, London, 1875, p. 26. "Roman legislation, like our own," writes Jolowicz, "was usually of a political character, and the development of private law was, in the main, left to the other sources, especially interpretation and magisterial edict." *Historical Introduction to the Study of Roman Law*, Cambridge, 1939, p. 84, and Bryce, "Methods of Law Making in Rome and England" in *Studies in History and Jurisprudence*, Oxford, 1900, pp. 669-744.

sical condition of Jewish religious observance. Our religious analysts have often and betimes pointed out the progressive decomposition of Jewish living and thinking in this hemisphere. The Jews of this country may be divided roughly into three groups with respect to their religious affiliation in so far as they have any.

The liberal group, known as the Reformed Jews constitute a fairly homogeneous and complacent class of folk. They pin their faith principally on the notion that Judaism is essentially a system of ethical monotheism, sustained by such rich and concentrated vitamins as moral aspirations, mixed with a tiny portion of ceremonials. Is this not a modest return to the religion of *אדם הראשון*? For did not our sages inform us *אדם הראשון לא נצטווה אלא על עבודה זרה בלבד ויש אומרים אף על הדינים*⁵³ The world that witnessed the birth of this highly optimistic type of Judaism has vanished into smoke. But its sponsors and votaries still cherish the idealistic and romantic vision of a mission to convert the heathen in this great cynical society of ours into the belief in one God,⁵⁴ while they themselves maintain a free and easy attitude toward their own *quantité négligible* of religion. Did not an ancient critic once declare: "Thou believest that there is one God, thou doest well: the devils also believe, and tremble. But wilt thou know, O, Vain man, that faith without works is dead"?

A second group comprising a considerable portion of Jews of varying shades of piety and conviction are commonly called Orthodox. This label was first fixed upon the true believers in the Gospel by the wicked and supercilious Roman emperors.⁵⁵

⁵³ Abodah Zarah 56b.

⁵⁴ R. Solomon Kluger, in a responsum written in 1844 to R. Zewi Hirsch Lehren of Amsterdam, discusses the Reform conference in Braunschweig, and among other things, he makes the point that one who prays for the Messiah is not a *מורד במלכות*, cf. his Responsa בחיים ובחרה בחיים, Budapest, 1934, vol. I, no. 29 and Ketubot 111a באומות העולם לא ימדרו במלכות המשיח.

⁵⁵ In an imperial decree issued by Gratian, Valentinian and Theodosius in 381 C. E., we read "*ut cunctis orthodoxis episcopis, qui Nicaenam fidem tenent* (Code of Justinian I.1.2.2) and in 531 Justinian issued the following decree: We order that no testimony shall be given against orthodox litigants

The devotees of Orthodoxy, as the appellation indicates, claim to be in exclusive possession of the right belief.⁵⁶ Viewed objectively, contemporary Orthodoxy actually represents, more or less, the form in which Judaism was crystallized in the 18th century. R. Elijah of Vilna, of course, was right when he insisted that a Jew who punctiliously observed the *Shulhan Aruk* was a good Jew (אדם כשר) but was far from being a pious Jew (חסיד).⁵⁷

And it is equally true that the Orthodox leaders of our day, possess the incomparable merit, and all praise and thanks to them, for stressing unyieldingly the primacy of the study of the Talmud, even if this study has some times been perverted into an inept system of grotesque and barren dialectics. Furthermore, they deserve recognition for holding on unflinchingly to the teachings of the traditional Halakah, thereby betraying a singular intuition born of the soundest instinct.

Nevertheless, Orthodoxy is not meeting the existing situation because it has espoused the outworn doctrine of *laissez-faire*,⁵⁸ and has consequently bogged down in a morass of stubborn literalism and dogmatism. It has lost the right touch on life and the right way of approach.⁵⁹ Having become involved in

by a heretic, or by one who adheres to the Jewish superstition whether one or both parties to the suit are orthodox. (*Code of Justinian* I.5.21), cf. Apuleius, *Florida* I.6 who refers to the *Judaei superstitiosi*.

⁵⁶ This is in sharp contrast to the liberal view of Albo who remarked: that a scholar with a passion for truth who interprets Scripture in accordance with his own understanding, albeit erroneous, is far from being a heretic or infidel אבל מי שאינו מחבון . . . לנשות מדרך האמת . . . אלא לפרש הפסוקים לפי דעתו אע"פ שיפרש אותם בחלוקה האמת אינו מין ולא כופר חלילה (*Ikkarim* I.2.7, ed. Husik, I, 54).

⁵⁷ Baruch Epstein, מקור ברוך, I, 733.

⁵⁸ Judaism is considered like a stone structure, when one of the stones is loosened then all the others are disturbed. To borrow a phrase used in another connection, שחרערה אחת מהן נחרערה כיון שאבנים של אבנים כיון שחרערה אחת מהן נחרערה, cf. Y. Mo'ed Katan, III.7, and Ratner, *loc. cit.*, p. 131, R. Hananel to Mo'ed Katan 26b reads שחרערה, cf. also Genesis Rabbah 100.7, ed. Theodor-Albeck, p. 1292.

⁵⁹ R. Yohanan informs us that the overscrupulousness (ענותנות) of R. Zechariah, son of Eucolus brought about the destruction of the temple, the burning of the holy of holies, and the exile from Palestine, Gittin 56a. This reminds us of a remark of Thomas Jefferson: "To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty,

the equivocal stunts of formalistic reasoning, it is unable to face the grim realities of the changing American scene,⁶⁰ in spite of the adequate learning at its command. The present situation reminds us of a passage in the Midrash: ואיש תרומות ירסנה זה חכם והוא יודע הלכות מדרשות ואגדות ויתום ואלמנה הולכין אצלו שיעשה דין ביניהם והוא אומר להן עסוק אני במשנתי איני פנוי אמר להם האלהים מעלה אני עליך כאלו החרבת את העולם לכן נאמר איש תרומות ירסנה. Commenting upon the verse איש תרומות ירסנה (Prov. 29.4), the Midrash⁶¹ remarks that the איש תרומות connotes the scholar who is steeped in Halakah, Midrash and Agada. However when an orphan or a widow appears before him to obtain justice, he responds, "I am occupied with my studies; I have no time."⁶² Whereupon the Deity proclaims, "I consider you responsible for the chaotic condition of society."

The smug complacency and the spiritual inflation of the Orthodox are reinforced by the dubious doctrine known in recent times as אמונת חכמים.⁶³ Briefly, it signifies that the pilpulistic method of explaining the Halakah as taught in the Yeshibah, and expounded in their ספרי הלכה, represent the *sole* authentic interpretation of the genuine Halakic tradition.^{63a}

It is true that in the Orthodox camp are to be found many

property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means . . . The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril."

⁶⁰ Klatzkin gave a vivid description of German Orthodoxy of a generation ago in his ווטות, Berlin, 1925, pp. 129-137.

⁶¹ Shemot Rabbah 30.1 and parallels.

⁶² One is vividly reminded of the celebrated Cujas who refused to take part in the discussion of the religious wars which engrossed the attention of his contemporaries. When any one approached him on the subject, he would respond: "*Nihil hoc ad edictum praetoris*. Cf. also Maitland, *English Law and the Renaissance*, 1901, p. 55.

⁶³ Cf. Abraham Ragoler of Vilna, מעלות התורה, New York, 1946, pp. 117-118. The term אמונת חכמים is first found in פרק קנין תורה, VI.5. Cf. the two interpretations given by the מדרש שמואל, *ad loc.* There are two books by this name, one by Basilea on Cabala, first printed in Mantua, 1730, and one by Abraham Ḥayyim Viterbo, printed in וקנים, טעם, ed. Eliezer Ashkenazi, Frankfurt a/M., 1855.

^{63a} A reasonable and sensible approach is presented by Rabbi S. Zevin in his אישים ושיטות, Tel Aviv, 1952.

sincere and great חכמים תלמידי who do not approve of the policies or politics of their wilful and dominating leaders, but they are cowed into an undignified silence and submission, and are rendered impotent for salutary action.

The third group, which is taking hold upon the imagination of an ever increasing number of our people, is identified with what is now universally known as Conservative Judaism. Conservative Judaism derives its principal insights from the doctrines promulgated by Solomon Schechter and the founders of this Seminary who in turn were inspired by the teachings of the school of historical Judaism instituted in nineteenth century Germany by Zechariah Frankel and Heinrich Graetz.

Historical Judaism, like Orthodoxy, is dedicated and pledged to the preservation of Traditional Judaism, which it regards as being in the main stream of the Jewish tradition. Unlike Orthodoxy which seeks to freeze Judaism in a mould two centuries old, exponents of Conservative Judaism appreciate the fact that Traditional Judaism is a product of historical forces, and like every living organism is constantly in a state of eternal flux. Official Orthodoxy is suspicious of the study of philosophy⁶⁴ and decries the historical outlook as pernicious,^{64a} and is perturbed by contact with general culture as deleterious to its doctrines. Its prototype is the immortal Rashi, one of the greatest Talmudists of all times. This genial and congenial scholar drank exclusively from the pure waters of the fountain of Judaism.

The leaders of Conservative Judaism are persuaded that Traditional Judaism cannot be arrested in the course of its development and because of its very nature and essence, cannot stagnate. Furthermore, they maintain that traditional Judaism

⁶⁴ While Elijah of Vilna is responsible for a new and broader approach to the study of the Talmud, his opposition to the study of philosophy which he designated הפלסופיה הארורה did much to bring about a feeling of antagonism to the subject. *Yoreh Deah*, 179.13, cf. Dienstag, *Talpiyot*, IV, nos. 1-2, pp. 253-268.

^{64a} It would not even accept the judgment of Menendez Y Pelayo who shrewdly suggested that: "*el método histórico se ejercita con más serenidad sobre cosas lejanas*," cf. his *Ensayos de Critica Filosófica*, Buenos Aires, 1946, p. 151.

can and will flourish in an atmosphere of freedom and culture; witness the flowering of Jewish thought and learning during the Geonic and Spanish-Arabic epoch. I need scarcely remark that some of our greatest Jewish minds were produced by a blending of Jewish and general culture. Its two most illustrious exemplars, Saadia and Maimonides, if they were living today, would be acclaimed by the adherents of historical Judaism as their most faithful expositors and interpreters.

Admittedly, the problems of belief and practice for Jews living in a free environment and fully participating in the general culture are ever so much more complicated than they are for our coreligionists who are committed to an isolationist policy, but this need not deter bold and brave spirits, who will regard it as a challenge, rather than an occasion for despair.

After having meandered far afield, I now mean to return to my original theme. Without pretending to have perfect understanding of all things from the first, I do purpose to set forth a declaration of principles which I believe was envisaged by the illustrious founders of the school of historical Judaism, which I fancy, should be acceptable to most of us today.

I. *The Divine Origin of the Law*

The Law is the product of divine inspiration. Moses, our greatest lawgiver, as well as the prophets who succeeded him received divine revelations⁶⁵ embodying great religious and moral

⁶⁵ This subject has been copiously dealt with in modern times. For a historical approach we wish to single out some of the more important: E. König, *Der Offenbarungsbegriff des Alten Testaments*, Leipzig, 1882, W. Lotz, *Geschichte und Offenbarung im Alten Testament*, Leipzig, 1893, Bevan, *Sibyls and Seers*, London, 1928, C. C. T. Webb, *Religion and the Thought of Today*, Oxford, 1929, pp. 36 ff. B. D. Eerdmanns, *The Covenant at Mount Sinai Reviewed in the Light of Antique Thought*, Leiden, 1939, A. Guillaume, *Prophecy and Divination*, 1939, A. G. Herbert, *The Authority of the Old Testament*, 1947, H. W. Robinson, *Inspiration and Revelation in the Old Testament*, Oxford, 1946, Heschel, *Die Prophetie*, Krakow, 1936, *God in Search of Man*, New York, 1955, and H. Knight, *The Hebrew Prophetic Consciousness*, London, 1947, pp. 109–120. For a philosophical approach, cf. Steinheim, *Die Offen-*

truths.⁶⁶ This belief, which was always a cardinal tenet of our faith, is indispensable for a truly spiritual appreciation and interpretation of the cosmos and a profound veneration for the religious and ethical injunctions and admonitions of Scripture. If it be insinuated that we are indulging in the dubious luxury of emotional verbalization or idle logomachy rather than expressing a meaningful conviction,—for to believe in one's thoughts is genius as Emerson said,—let us hasten to explain that we do resent the innuendo that supernatural is the laziest word in the vocabulary of ignorance.⁶⁷ We understand by revelation the internal experience of the prophet permeated by the divine spirit,⁶⁸ rather than a perceptible event in the external

barung nach dem Lehrbegriff der Synagoge, vols. I–IV, 1835–1865, Wiener, "Zur Geschichte des Offenbarungsbegriffs," in *Cohen Festschrift*, pp. 1–24. R. Eisler, *Handwörterbuch der Philosophie*, 2nd ed., Berlin, 1922, s. v. Rechtsphilosophie, pp. 533–537, contains a brief and good discussion with a Bibliography, Rosenzweig, *Der Stern der Erlösung*, Frankfurt, 1921, pp. 199–261. Cohen, *Die Religion der Vernunft*, 2nd ed., Frankfurt, 1929, pp. 82–98. M. Guttmann, *Das Judentum und seine Umwelt*, 98 ff., J. Guttmann, *Die Philosophie des Judentums*, Munich, 1933, p. 17, and Kaufmann, תולדות האמונה הישראלית, Tel Aviv, 1942, pp. 60 ff.

⁶⁶ In Dan. 9.13 the Pentateuch is described as the divine truth, cf. also Ps. 25.5 and 26.3. "Each age has expressed the conviction that law is not a mere human convention, but is conditioned by the Eternal nature of things, and that behind nature is Intelligence and Will," cf. C. F. Kent, *Encyclopedia of Religion and Ethics*, VII, 823. According to Campanella, "Revelation and nature, these are the two sources of all knowledge, the primary divine autographs of which all human mysteries are but the imperfect and inaccurate copies, and with which they need to be constantly compared to see if they contain anything false," quoted by R. Flint, *Philosophy as Scientia Scientiarum*, London, 1904, p. 101, cf. also Eucken, *The Truth of Religion*, 1911, S. A. Cook, *The Truth of the Bible*, Cambridge, 1938, and E. Frank, *Philosophical Understanding and Religious Truth*, 1945.

⁶⁷ Cf. L. K. Anspacher, *Challenge of the Unknown*, New York, 1947. Cf. also Cicero, *De Divinatione*, II.54–55 (Loeb Classics ed., pp. 495–497). For Plutarch's doctrine of revelation, cf. Zeller, *Die Philosophie der Griechen*, III, 2 (3rd ed.), Leipzig, 1881, pp. 193 ff., for the theory of inspiration in Greek Poetry, cf. Gilbert Murray, *The Classical Tradition in Poetry*, Cambridge, 1927, p. 10, note 2. For the doctrine of revelation in Islam, cf. Grünebaum, *Medieval Islam*, Chicago, 1946, pp. 64–107.

⁶⁸ Cf. also Ex. 31.3, ואמלא אותו רוח אלהים בחכמה ובחבונה ובדעת ובכל מלאכה

world. As the prophet Isaiah aptly described the phenomenon: 'ונחה עליו רוח ה' רוח חכמה ובינה רוח עצה וגבורה רוח דעת ויראת ה'.'⁶⁹ The inspiration which was not necessarily verbal nor plenary, was precipitated by a dynamic operation of the רוח הקדש through the mind and heart of our sacred writers,⁷⁰ as Elihu put it in his inimitable terms: אכן רוח היא באנוש ונשמח שדי תבינם (Job 32.8).

This belief is based on an act of faith and is not capable of rational demonstration,⁷¹ and its potency is manifest in a deep moral sense residing in the heart and soul of man, that overflows and fulfills itself in spiritual living according to principles based on the Torah.

II. *The Immutability of the Law*

The view that the Mosaic Law is immutable is one of our basic beliefs and constitutes one of the chief factors for the survival of the Biblical-Talmudic Law throughout several millennia of

לעולם ימוד אדם עצמו כאלו קדוש שרוי בתוך מעיו שנאמר בקרבך, And Ta'anit 11a-b, קדוש, cf. also Tosafot, *ad loc.*, s. כאלו. Rashi's commentary was written ברוח הקדש, cf. Assaf, מקורות לחולדות החנוך, I, 66. According to the Ba'al Shem כל החבורים עד להמשיח ועד בכלל ברוח הקדש נתחברו This is quoted by Agnon ספר סופר וספור in Jerusalem, p. 78.

⁶⁹ Isa. 11.2.

⁷⁰ Cf. Mekilta to Ex. 18.19, היה להם ככלי מלא דברות, Be for them like a vessel filled with divine revelations (ed. Horowitz, p. 199), and I. Levy, *Ein Wort über die Mechilta*, Breslau, 1889, p. 38, note and Didascalia, chap. V. For כלי לדברות, cf. Taylor, *Sayings of the Jewish Fathers*, Cambridge, 1897, p. 26, and Kuzari, IV.3, יש רומזים על הנביאים כי הם ככלים הראשונים לחפץ האלהים, cf. also Klatzkin, אוצר מנחים הפילוסופיים, Berlin, 1928, II, 88-89. According to Justin Martyr, the divine spirit acted on inspired men like a harp or lyre, from which the plectrum elicits sounds. This view was shared more or less by Tertullian, Irenaeus and Origen, cf. Hastings, *Dictionary of the Bible*, I, 296. For Philo's doctrine of inspiration, cf. Zeller, *loc. cit.*, p. 342. For the doctrine of inspiration in Jerome, cf. L. Scheide, *Die Inspirationslehre des heiligen Hieronymus*, Freiburg in Breisgau, 1910.

⁷¹ Cf. Ps. 139.6. Such knowledge is too wonderful for me, too high, I cannot attain unto it, and Hagigah 13a, אל חרוש ובמכוסה ממך אל חחקור, במופלא ממך אל חדרוש ובמכוסה ממך אל חחקור, Santayana remarks, "The same absence of verification distinguishes revelation from science, for when the prophecies of faith are verified, the function of faith is gone," *Interpretation of Poetry and Religion*, p. 8.

tragic Jewish history.⁷² This doctrine imbued the Jew with the feeling of the eternal value of his faith and practices. A liberal interpretation of this doctrine by the rabbis of the Talmud rendered the law viable and pliable without impairing in any way the spirit and purpose of the ancient Law. Viewed historically, it means that the religious and moral truths, the ethical principles, and the poetry and the symbolism⁷³ of the ritual will endure throughout the generations of men.⁷⁴ Practically speak-

⁷² Cf. Friedlaender, *Die religiösen Bewegungen innerhalb des Judentums*, Berlin, 1905, pp. 57 ff. Medieval jurisprudence too, was permeated by the idea that there "is an eternal immutable law, equally valid at all times, and all places, which can be deduced by an act of reason, by a purely intellectual process, from the nature of the thing itself," cf. Sohm-Mitteis-Wenger, *Institutionen des römischen Rechts*, Munich, 1924, p. 149, note 14.

⁷³ Gibbon tells us that "every mode of religion, to make a deep and lasting impression on the human mind, must exercise our obedience, by enjoining practices of devotion; and must acquire our esteem, by inculcating moral duties analogous to the dictates of our own hearts." *Decline and Fall of the Roman Empire*, vol. I, Modern Library ed., p. 174 (chap. 8), cf. also E. Bevan, *Symbolism and Belief*, London, 1938, Max Schlesinger, *Geschichte des Symbols*, Berlin, 1912, J. Haig, *Symbolism*, 1869, and D'Alviela, *The Migration of Symbols*, R. Patai, *Man and Temple*, 1947, pp. 105-139, and P. A. Schilpp, *The Philosophy of Ernst Cassirer*, New York, 1949, M. Foss, *Symbol and Metaphor*, Princeton, 1949, P. Diel, *Le Symbolisme dans la Mythologie grecque. Étude psychoanalytique*, Paris, 1952, Robinson, "Prophetic Symbolism," in *Old Testament Essays*, London, 1927, pp. 1-18, cf. also "Symbolism and Values" and "Symbols and Society" published by the *Conference of Science, Philosophy and Religion*, vols. 13 and 14, and "Religious Symbolism," published by the *Institute for Religious and Social Studies*, New York, 1955, as well as Heschel, *Man's Quest for God*, New York, 1954. Note well Gilbert Murray's reference to "Aristotle's famous and much misunderstood dictum that 'poetry is more philosophic and higher than history'," *The Classical Tradition in Poetry*, p. 132.

⁷⁴ Cicero tells us that "true law is right reason (*vera lex recta ratio*) in agreement with nature, it is of universal application, unchanging and everlasting; . . . It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely . . . but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge" (*De Re Publica*, III.22, 33, Loeb Classics edition, p. 211). For Azariah di Rossi's attitude on this point, cf. Baron in *Jewish Studies in Memory of Israel Abrahams*, p. 29, note 62, and

ing, this doctrine signifies that Biblical law is not subject to abrogation,⁷⁵ but can only be amended through the traditional method of interpretation.⁷⁶

III. *The Historical Development of the Law*

Historical Judaism is committed to the doctrine that Jewish Law from the time of Moses down to the ערוך השלחן has undergone a long and eventful process of evolution⁷⁷ without altering its original essence or nature, or modifying its pristine principles and purposes.⁷⁸

To this tenet, the rabbis may be said to agree in principle. While they did not, and could not, possess a historical sense, in the scientific meaning of the term, they betrayed a species of historical consciousness.⁷⁹ They were aware that many of the legal or religious institutions of their day sprung up at different

p. 41, note 103. Cicero is most likely the source for the *Institutes of Justinian* I.2.11. Cf. especially ed. Schrader, Berlin, 1855, for further references.

⁷⁵ Cf. Yebamot 89b, וְכִי בֵּית דִּין מַתִּינִין לַעֲקוֹר דְּבַר מִן הַחוּרָה.

⁷⁶ Thus R. Joshua permitted an Ammonite proselyte to marry a Jewess holding that the Deuteronomic prohibition no longer applied in view of the fact that the Ammonites were no pure race after the wars of Sennacherib. כְּבֵר עָלָה מִנְחָרִיב מֶלֶךְ אֲשׁוּר וּבִלְבָּל כָּל הָאוֹמוֹת, M. Yadayim IV.4, Tosefta II.17.

⁷⁷ It is true as Becker has pointed out that "what is peculiar to the modern mind, is the disposition and the determination to regard ideas and concepts, the truth of things as well as the things themselves, as changing entities, the character and significance of which at any given time can be fully grasped by regarding them as points in an endless process of differentiation, of unfolding, of waste and repair," (*The Heavenly City of the Eighteenth Century Philosophers*, New Haven, 1932, p. 19). Nevertheless there is a danger of the abuse of the historical method as was noted by John Morley in his treatise, *On Compromise*, London, 1898, pp. 28 ff. On the history of Legal Development at Rome and in England, cf. Bryce, *Studies in History and Jurisprudence*, pp. 745-781, and Joseph Needham, *History is on Our Side*, New York, 1949.

⁷⁸ The original purpose of the law was to promote the physical welfare and spiritual happiness of man as Maimonides has pointed out, *Guide of the Perplexed*, III.27, and in his *Iggeret Teman*, cf. my English translation, p. IV.

⁷⁹ Cf. M. Glatzer, *Untersuchungen zur Geschichtslehre der Tannaiten*, Berlin, 1933. Ihering noted that the Romans possessed no sense for the historical development of law, cf. *Geist des römischen Rechts*, I (4th ed.), Leipzig, 1878, p. 93.

intervals, which they tried to fix in accordance with historical canons current in their time.⁸⁰

To cite a few examples: Thus we read: Moses instituted the custom of the seven day marriage feast and seven days of mourning, *משה החקין שבעת ימי המשתה ושבעת ימי האבל*,⁸¹ with regard to Joshua,⁸² it is said *עשרה חנאין התנה יהושע*, that Boaz⁸³ instituted *ברכת חתנים בעשרה*. With respect to David,⁸⁴ we are told *נחניים שלמה חקן עירובין*, and as for Solomon,⁸⁵ we learn *ונטילת ידים*. The introduction of the historical point of view into the field of Jewish studies is one of the greatest glories of the *Jüdische Wissenschaft*, and has revolutionized the whole structure of Jewish learning including the study of the Halakah, with far-reaching effects.

IV. *The Concept of* כנסת ישראל⁸⁶

Fundamental to our thinking is the doctrine of *כנסת ישראל*, by which we mean that the Jewish people must be regarded as one community with respect to the essential principles of Jewish Law

⁸⁰ Cf. Bloch, *שערי חורח התקנות*. *Takkanah* reminds one of the function of the Roman praetor, *corregendi juris civilis gratia*, *Digest*, I.1.7.1. For the religious laws we read that Emperor Claudius as Pontifex Maximus, *Quaedam circa caeromonias . . . aut correxit*, cf. G. May in *Revue Historique de Droit Français*, 1938, p. 2, note 3.

⁸¹ Y. Ketubot I.1. The meaning of *חקן* in this passage is that Moses sanctioned the old custom of a seven day marriage feast dating back as far as the time of Jacob, (Gen. 29.27, cf. also Judg. 14.12 and Tobit 11.19) and the ancient custom of a seven day mourning which likewise may be traced to the time of Jacob. (Gen. 50.10, cf. I Sam. 31.13, Job 2.13, Ben Sira 22.13 and Judith 16.24), cf. also Y. Mo'ed Katan III.5, *מנין לאבל מן החורה שבעה ויעש*, *לאביו אבל שבעה ימים*. However in Mo'ed Katan 20a it is derived from Amos 8.10, cf. Maimonides, *Mamrim*, II.5, *להנהיג מנהג* means to sanction a custom.

⁸² Baba Kamma 80b-81a.

⁸³ Ketubot 7b. The religious marriage among the Romans known as *conferratio* was performed in the presence of ten persons. Gaius I.112, cf. also Corbett, *The Roman Law of Marriage*, pp. 71-72, Marquardt, *Das Privatleben der Römer*, Leipzig, 1879, p. 32, note 1.

⁸⁴ Yebamot 89b.

⁸⁵ 'Erubin 21b.

⁸⁶ R. Hīda first employs the term *כלל ישראל* in Sanhedrin 58b. In Abodah

and observance. For many laws were instituted by and for the *Keneset Yisrael*. There is a most interesting statement by Raba, אמרה כנסת ישראל לפני הקב"ה רבונו של עולם הרבה נזירות, גורתי על עצמי יותר ממה שגזרת עלי וקיימתי.⁸⁷ *Keneset Yisrael* said to the Holy One Blessed be He, "Lord of the Universe. Many more are the enactments that I have instituted for myself, than the laws you have decreed for me, and I have kept them all." What is most remarkable about this passage is the fact that the נזירות are described as the enactments of *Keneset Yisrael* and not depicted as the institutions of the Rabbis.⁸⁸ Hence we must conclude that the sense of Raba's observation is that *Keneset Yisrael* is considered as having taken part in the making of the laws by virtue of the fact that there was unity in the Jewish community in their behalf.

We are fully aware of the fact that his ideal has never been attained and we are further than ever from realizing it in our day. It is a goal most worthy of our assembly imbued as it is with a broad historical perspective, and suffering from no illusions that it possesses an exclusive copyright to the absolute truth, which as Santayana has well said, is incompatible with being alive. We must always consider ourselves part of *Keneset*

Zarah 37a, it is said that the 18 decrees of the schools of Hillel and Shammai are binding because פשט איסורו בכל ישראל. Rashi employs the expression כלל ישראל in connection with the reception of Proselytes, cf. Yebamot 48a, s. v. לענין. Maimonides in his commentary on Sanhedrin, with respect to the doctrine of resurrection uses the term כלל ישראל in the Arabic text, ed. Holzer, Berlin, 1901, p. 29, *Issure Biah*, XIV.17 and in *Hilkot Ebel* I.10, which is repeated *Yoreh Deah*, 345.5, cf. also Tosafot, Shabbat 49a, s. v. נוסלם, who remark, משום דבשנוי ערקתא מתנהג כנוי ודומה שמוציא עצמו מכלל ישראל, cf. also Tosafot, Makkot 9a, s. v. אלמה, who remark, חוץ מנר חושב דלא הוי בכלל, cf. also Samuel Edels to Sanhedrin 27b, who uses the phrase כלל ישראל. The phrase is a development of the thought in Mekilta, הכלל, לפי שהוציא את עצמו מן הכלל (ed. Horowitz, p. 73) and of the statement of Samuel, כלל ישראל, לעולם אל יוציא את עצמו מן הכלל (Berakot 49b).

⁸⁷ 'Erubin 21b.

⁸⁸ Noteworthy is that *Keneset Yisrael* is contrasted with the synagogue and the academy in Pesahim 87a. Cf. also the statement of R. Hanina b. Papa, כל הנהגה מן העולם הזה בלא ברכה כאילו נוזל להקב"ה וכנסת ישראל, i. e. he transgresses the law of God and Israel, as is indicated by the verses he quotes, cf. also Zohar II.98a, כל ההוא דזכי לחליסר שנין והלאה איקרי בן לכנסת ישראל.

Yisrael which includes the Jews the world over. The term *Keneset Yisrael* transcends the appellation Conservative Judaism, just as the whole is greater than any of its parts.

Accordingly we must not allow the Conservative movement to degenerate into a sect, party or faction, as far as the Halakah is concerned. There must not be, e. g. a Conservative law on Kashrut, the Sabbath, or Gittin, in contrast to the Orthodox law on the same subject. Let us follow the Biblical injunction, תורה אחת ומשפט אחד יהיה לכם⁸⁹ and the sage counsel of Resh Lakish, לא תעשו אנודות אנודות.⁹⁰

We are not oblivious of the existence of controversies over the interpretation of the law traceable to an early period. The controversy goes back to the time of Jose ben Yoezer and Jose ben Yoḥanan.⁹¹ The disputes between the school of Shammai and Hillel have exercised the ingenuity of scholars from time immemorial.⁹² Honest differences pertaining to the interpretation of the law were always a constant recurring feature in Jewish religious history. To cite only one example: Joseph Caro and Isserles. What we must never let come to pass is the origin of a new faction in Judaism. Let us heed the warning of the Talmud, משרבו תלמידי שמאי והלל שלא שמשו כל צרכן רבו מחלקות בישראל ונעשית תורה כשתי תורות.⁹³

V. *The Primacy of the Talmud*

The Talmud enjoys a unique position in the history of Jewish legal theory and practice. While Scripture is the original source and inspiration of all Jewish ritual and civil practices, it is during the Talmudic period that Jewish Law reached its classical exposition. This was duly noted by the Geonim that transformed

⁸⁹ Num. 15.16.

⁹⁰ Yebamot 13a, this notion was fancifully derived by him from תחנודדו לא, cf. also *Be'er Heteb* to *Orah Ḥayyim*, 493.9.

⁹¹ Hagigah II.2.

⁹² Schwartz, *Die Controversen der Schamaiten und Hilleliten*, Vienna, 1893.

⁹³ Sotah 47b. Note also the statement of R. Gamaliel, שלא ירבו מחלוקה בישראל, Baba Metsia 59b, and cf. *Iggeret of R. Sherira Gaon*, ed. Levin, p. 23.

the First Commentary upon the Mishnah, into the supreme authority for Jewish law and thought, a position from which it was never dislodged throughout the ages.⁹⁴ Each generation extracted from the Talmud what it was seeking. Scholars addicted to dialectics found an ample outlet in the tortuous *Sugyot* of the Talmud, for the Rabbis were no strangers to the oblique and circuitous form of reasoning. Preachers, philosophers, and mystics discerned in the Agada a fertile soil in which they planted their favorite doctrines. Odd as it may seem, the great personalities withal who created these cherished values were, to the students of the Talmud, as impersonal and infallible as mathematical equations, I am almost tempted to say, propositional functions.

Living as we do in an era when the fate of our people hangs in the balance, in an age of undisguised cynicism, we need to turn to the Talmud, to reinforce our flagging spirits. It is imperative now more than ever, to recapture the spirit and significance of the Talmud with its uncanny insights and precious intuitions, its homespun philosophy, as well as the courage, independence and resourcefulness of its teachers. Let us be awakened and instructed by their intelligence and live in the new dimensions created by them.^{94a} The pathway leading to our salvation *לפי עניין דעת* lies in the unhampered historical approach to the Talmud with its infinite possibilities, rather than in pure pilpulistic study with its profound but exceedingly narrow aims. Its principal purpose, namely, to prove that a preconceived and pre-existing harmony rules unremittingly in the vast spheres of the Halakah, even if it were true, is too limited an objective in a dangerous era, like ours.

The historical approach implies expending more time and energy on the original sources of the Talmud rather than on the pilpulistic commentaries,⁹⁵ which often stand like a veil between

⁹⁴ Cf. Boaz Cohen, קונטרס החשובות, p. 18, *infra*, pp. 51, 73.

^{94a} Cf. the statement *אשרי אדם שעמלו בחלמוד ולא שיהא דולג במקרא ובמשנה ויבא לחלמוד*, Soferim XV.6, ed. Higger, pp. 279–280, cf. the interesting reading of this passage in R. Asher to Baba Metsia II.29.

⁹⁵ We are told that the נציב criticized the scholar who studied the Talmud

the text and the student. The dialectical approach to the Talmud bears a close resemblance to the scholastic method of studying Roman Law in Mediaeval Europe.⁹⁶ The text of the *Digest* was usually cited together with the glosses of Vacarius, Azzo⁹⁷ or Accursius, and the passages of Roman Law were regarded through the eyes of the great commentators, such as Cinus⁹⁸ Bartolus^{98a} or Baldus. A great change took place when the 16th Century French humanist and Romanist, Jacques Cujas,⁹⁹ introduced the historical method into the study of Roman Law, insisting that the real understanding of Roman Law begins with the comprehension of the saying of the ancient

from the קצות החושן, cf. Maimon (Fishman), שרי המאה, V, 183, and M. Berlin, רבן של ישראל, New York, 1943, p. 106.

⁹⁶ For a characterization of the scholastic method, cf. especially Vinogradoff, *Roman Law in Medieval Europe*, 2nd ed., Oxford, 1929, pp. 56 ff. Sherman, *Roman Law in the Modern World*, vol. I, 3rd ed., pp. 196–213, Sohm-Mitteis-Wenger, *Institutionen des römischen Rechts*, Munich, 1933, 144 ff., H. Kantorowicz, "Kritische Studien Zur Quellen- und Literaturgeschichte des römischen Rechts im Mittelalter," *Z. S. S.* 49 (1929), 55–114 and his *Studies on the Glossators of the Roman Law*, Cambridge, 1938. For a description of the dialectical method among the Moslems, cf. Bryce, *Studies in History and Jurisprudence*, p. 657.

⁹⁷ With respect to Azzo there was a proverb, "He who has no copy of Azzo, need not go to the court of justice, *Chi non ha Azzo, non vada a Palazzo*, cf. Savigny, *Geschichte des römischen Rechts*, 2nd ed., vol. IV, chap. 37.

⁹⁸ The scholastic method was first applied to jurisprudence by the French jurists in the second half of the 13th century, (Savigny, *loc. cit.*, V, 603 ff.). In the first half of the fourteenth century, Cinus imported it into Italy, (Savigny, *loc. cit.*, VI, 88, 155).

^{98a} In Padua, the text, gloss, and Bartolus' commentary were taught, cf. Savigny, *Histoire du Droit Romain au Moyen Age*, IV, Paris, 1839, p. 226. En passant, it may be mentioned that Bartolus studied Hebrew under Guido de Perusio, cf. Savigny, *loc. cit.*, p. 224. The glossators recognized the contradictions in the sources which they covered up with harmonizing interpretation, cf. F. Schulz, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, 37, p. 24.

⁹⁹ Cf. Karlowa, *Römische Rechtsgeschichte*, Leipzig, 1885, I, pp. 5–8, J. Flach, *Cujas Les glossateurs et les Bartolistes*, Paris, 1883, Girard, in *Nouvelle Revue historique de Droit français et Etranger*, 40 (1916), 429 ff., 64 (1920), 243 ff., C. W. Westrup, "Notes sur Cujas," in *Studi in onore di Pietro Bonfante*, III, Milan, 1930, pp. 134 ff., and Koschaker, *Europa und das Römische Recht*, p. 109, note 4.

Roman jurists themselves and not with the lucubrations of their diligent expositors. I have heard it repeated often in circles zealous for the law, that the historical approach to the Halakah is perilous to tradition. It is our firm conviction that true piety¹⁰⁰ is fully consistent with historical erudition, but is more often incompatible with fanatical ambition. With men steeped in the learning and the spirit of the Talmud, and familiar with the modern train of thought, we shall go a long way in our attempt to achieve a new synthesis in operational terms.

VI. *Concept of Authority*

We recognize the Biblical Law as interpreted by the rabbis and elaborated by the successive legal writers, as the ultimate authority for Jewish ritual and civil practice.¹⁰¹ Now, laws are necessarily framed in general terms,^{101a} while circumstances vary in each particular with time and place, so that it is beyond the capacity of the legislator to state the law for every future contingency. This gave rise to the need of tribunals to apply and interpret the law in a given instance. The earliest precedent for such an authority is found in Deut. 17.11, where we read:¹⁰² *על פי התורה אשר יורוך ועל המשפט אשר יאמרו לך תעשה לא תסור מן הדבר אשר יגידו לך ימין ושמאל*. While the activity of the court was originally conceived of as interpreting the law, in course of time

¹⁰⁰ Cf. Yoma 72b, *אוי להם לשונאיהם של חלמידי חכמים שעוסקים בתורה ואין בהם, יראת שמים*. When R. Hayyim of Sandez was asked what ethical books are most likely to lead to the attainment of true piety (חסידות) he replied, "There is only one book, Gemara, with Rashi's commentary and the Tosafot, cf. Maimon (Fishman), *שרי המאה*, Jerusalem 1947, V,70.

¹⁰¹ Cf. *infra*, pp. 73–74. Cf. R. Judah's remark: "*It is not alike in all men, in all places, and at all times*," M. Yebamot, XVI.3, and the statement *הכל לפי הדם*, M. Kelim XVII.11, and Mordecai, Baba Kamma 80.

^{101a} For laws, says Aristotle, "must of necessity be couched in general terms, but our actions deal with particular things," *Politics*, II.5.12, Loeb Classics edition, p. 131, cf. also Vinogradoff, *Common Sense in Law*, p. 209.

¹⁰² Cf. Maimonides, *ספר המצות*, Negative precepts, no. 312, and introduction to ed. Warsaw, 1883, 5a, with copious comments of the commentators to this verse, and Chajes, *חורת הנביאים*, chapter on *לא תסור*.

it assumed the powers of law-making under the guise of interpretation. The rabbis invoked this verse in support of such powers.¹⁰³

In order to thwart ill-equipped persons from deciding questions of ritual and civil law, the custom arose in early times requiring persons to be ordained prior to their exercise of such authority.¹⁰⁴ This practice seems to have been abolished when the Palestinian academies were closed. During the sixteenth century, ordination was revived in Palestine for a few years by R. Jacob Berab, but was attacked by R. Levi Ibn Ḥabib.¹⁰⁵ However, the modern practice of requiring Semikah, although it does not possess the authority of the ancient Palestinian ordination, has been in vogue for many centuries,¹⁰⁶ and has tended to keep out the unfit from meddling with the Law.

Now, in our day, when the pressing problem of interpreting the law is most delicate, it is all the more necessary that the discharge of this function be entrusted only to a body of men who combine expert knowledge of the Halakah, a special aptitude for applying theoretical rules to practical situations, a sense of the realities of the present, and a great devotion to the study of the law in all its aspects.

¹⁰³ Shabbat 23a, והיכן ציונו רב אויז אמר מלא חסור.

¹⁰⁴ On ordination, cf. *Jewish Encyclopedia*, VI, pp. 261–264 and IX, pp. 428–430. To the literature cited there, cf. also A. Epstein, *R. E. J.*, 46 (1903), 197–211, Bornstein, *החקופה*, IV, 1919, pp. 394–426, Daube, *Journal of Theological Studies*, 39 (1938), 45–59, Revel, *החורב*, V, 1939, pp. 1–26; Albeck, *ציון*, VIII (1943), 85–93, Hershman, *Rabbi Isaac ben Sheshet Perfet and His Times*, New York, 1943, pp. 203–213, Lieberman, *Historia Judaica*, V, 1943, pp. 99–100, *J. Q. R.*, N. S., 36 (1946), 360–364. Lieberman, *שקיעין*, Jerusalem, 1939, p. 77, Herzog, *הערת הסטוריות בהלכות סנהדרין*, in *סיני*, 1939, Zeitlin, *J. Q. R.*, N. S. 31 (1940), pp. 12 ff., Aptowitz, *מחקרים בספרות הגאונים*, Jerusalem, 1941, pp. 97–122, Assaf, *לקורות הרבנות*, in *האחלה יעקב*, Jerusalem, 1943, pp. 28 ff., J. Newman, *Semikah*, Manchester, 1950, Jacob Katz, *ציון*, 16 (1951), pp. 28–45, Lohse, *Die Ordination im Spätjudentum und in neuen Testament*, Göttingen, 1952.

¹⁰⁵ Frumkin, *חולדות חכמי ירושלים*, vol. I, 38 ff.

¹⁰⁶ Cf. Isserles to *Yoreh Deah*, 242.14. For the granting of partial Semikah, cf. Azulai, *ברכה*, *יוסף* to *יוסף*, *Yoreh Deah*, 242, 7–8, and Maimonides, *Hilkot Sanhedrin*, IV.8.

VII. *The Principle of Interpretation*

It is a basic concept of Conservative Judaism from its very inception, that modifications of ritual and ordinances required by new exigencies and contingencies, should transpire through due process of Jewish law.¹⁰⁷ It is this fundamental principle that has guided the Committee on Jewish law and 'בעזרת ה', will continue to direct it in all its opinions, decisions and interpretations.

Furthermore, the Committee on Jewish Law, though fully sensitive to the intricate and intriguing problems of the present, is controlled by a sense of the limitations imposed upon its authority and jurisdiction, but is not inhibited by a feeling of inadequacy. Consequently, the Committee on Jewish Law declines to entertain jurisdiction over certain aspects of Jewish family law,¹⁰⁸ which impinge upon the Jewish community entire, out of a decent respect for the opinions of *Keneset Yisrael*. In these matters it counsels caution,¹⁰⁹ and refuses to rush in where angels fear to tread, as the rabbis would say, כגון דא צריכא רבא.¹¹⁰

In our opinion, the bewildering problems of today are capable of a solution within the framework of the Jewish legal system. These are remedies, potentially speaking, for the *Agunah*, i. e. the forlorn woman, whose husband has disappeared, become

¹⁰⁷ Dr. Schechter made the significant observation: Liberty was always given to the great teachers of every generation to make modifications and innovations in harmony with the spirit of existing institutions. Hence a return to Mosaism would be illegal, pernicious, and indeed impossible. The norm as well as the sanction of Judaism is the practice actually in vogue. Its consecration is the consecration of general use — or, in other words, of Catholic Israel." See *Selected Writings Solomon Schechter*, ed. Norman Bentwich, Oxford, 1946, p. 36.

¹⁰⁸ Cf. Responsa of R. Samuel di Medina, to *Eben ha-Ezer*, no. 10, צריך הנכנס להורות בדבר ערוה להיות בקי בנמרא בספרא בספרי ובכולי תלמודא ובספרי הפוסקים כולם. Cf. statement of Paulus: A person learned in the law should be familiar with the degrees of relationship and affinity, *Digest*, XXXVIII.10.10 pr.

¹⁰⁹ Cf. the maxim, *Abundans cautela non nocet*, in *Fleta, seu Commentarius uris Anglicani*, I.28, 1 (ed. Selden, London, 1647).

¹¹⁰ Baba Metsia 101a, cf. also *ibid.* 16a, וזו צריכה לפני ולפני לפני.

demented, or disdainfully defies her demand for a *Get*; or the childless and hapless widow, whose contemptibly disobliging brother-in-law would not undergo *Halitsah* save for an excessive sum.¹¹¹ These solutions require exploration, study, and perfection in all their technical details.¹¹² The approval and implementation of such proposals are within the jurisdiction of an authority like the Palestinian rabbinate¹¹³ that enjoys the confidence of *Keneset Yisrael*.

As for the problems that fall within the scope of powers conferred upon it, the Committee on Jewish Law assumes full responsibility as far as our Assembly and its constituencies are affected. You certainly must know that the Committee has been diligent in its duties, for does not the Yerushalmi¹¹⁴ assure us *מחצלין בית דין חוקה אין* and most of you do acquiesce in the performance of its functions which is in strict consistency with the spirit of Jewish learning, piety and humanity,¹¹⁵ tempered by a keen sense of the realities of the existing situation.¹¹⁶ Nevertheless, we are under no illusions that some of our decisions find no favorable reception with some in our midst. The majority of our membership, however, do wish to live under the law as it is traditionally conceived, and would heartily subscribe to the interpretation of freedom given by R. Joshua ben Levi, *חרות על הלוחות אל תקרא חרות אלא חרות שאין לך בן חורין אלא מי שעוסק בחלמוד תורה*.¹¹⁷ Curiously similar is the utterance by the great

¹¹¹ Cf. Abraham Yudelovitch, *אב החכמה*, New York, 1927, pp. 7-105, who deals at great length with the problems of *Halitsah* through an agent, Jacob ibn Ḥabib in a lengthy responsum on *ליבם משומר* שוקקה יבמה lays down some fundamental principles on the method of arriving at decisions, cf. *Responsa of Elijah Mizraḥi*, no. 47, ed. Jerusalem, 1938, pp. 121-127.

¹¹² Cf. *infra*, p. 94, note 70.

¹¹³ Cf. Y. Nedarim VI.40a, *חביבה עלי כח קטנה שבארץ ישראל מסנהדרין גדולה*, and Berakot 63a; Aruk, s. v. *אשלי רבבי* and 'Ekah Rabbah 3.2. *ללמדך שכל דבר שביח, cf. also Y. Shebi'it I.5*.

¹¹⁴ Rosh Hashanah I.4 (57a), cf. also Y. Shebi'it I.5, *דין נותנים נפשם עליו סופו להחזיקים בידם כמה שנאמר בסיני*.

¹¹⁵ Rashi explains *יראת חטא* (Temurah 15b) as *האשכולות* ונמילת חסדים.

¹¹⁶ Cf. R. Asher to Baba Kamma III.12, *המנהג המצוי בינינו ישתנה*, *הלכך על פי המנהג המצוי בינינו ישתנה*. *הדין . . . כל שכן שישתנה הדין בחלוף הזמן כפי המנהג*.

¹¹⁷ Abot VI.2, Abot diR. Nathan, ed. Schechter, p. 10, cf. *Genesis Rabbah*

Roman lawyer Cicero, "We, all of us, in short, are in bondage to the law in order that we may be free." *Legum ministri magistratus, legum interpretes iudices, legum denique idcirco omnes servi sumus, ut liberi esse possimus.*¹¹⁸

An articulate minority exists in our midst which unconsciously overstates present perplexities, and paradoxes. Accordingly, they decry many aspects of the ritual as weak and beggarly elements in our religious system which they would relegate to the limbo of oblivion and they rebel against the entangling alliance with Jewish traditional law.¹¹⁹ They seek the free setting up of new premises, and the establishment of new categories of logic,^{119a} whereby the yoke of bondage of the law may be considerably eased.¹²⁰ Their slogan might aptly be described in the language of the Yerushalmi, *יש תורה ואיני סובלה*.¹²¹

In very truth, in our interpretation of the law, we have no vested interests in the heaping up of *חומרות* or chasing after *קולות*.¹²² The determining factor in our decisions is the question

92.1 and Yoma 72b, cf. also the poetic line *נשמת מלמדי מורשה נקראים בני חופש* in the *Shaharit* to Simhat Torah.

¹¹⁸ Cf. *Pro Cluentio*, 53, 164.

¹¹⁹ This was the view of the ancient allegorists too, cf. Philo, *De Migratione Abrahami*, 16, 450, cf. *Jewish Encyclopedia*, I, 631. Allegorical interpretations incidentally are very old. Theagenes of Rhegium (flourished about 525 B. C. E.) already suggested a twofold allegory of Homer. Cf. also I. Heinemann, "Die Wissenschaftliche Allegoristik der Griechen," in *Mnemosyne*, 1949, and his article in *ספר יוחנן לוי*, Jerusalem, 1948, pp. 46-58.

^{119a} "Men will often accept the baldest fictions as truths" says Santayana, "but it is impossible for them to give human meaning to vacuous conceptions, or to grow to love the categories of logic, interweaving their image with the actions and emotion of daily life. Religion must spring from the people; it must draw its form from tradition and its substance from the natural imagination and conscience." *Poetry and Religion*, p. 80.

¹²⁰ In ancient times, it was Paul who said that the Jew is a slave to the Law, cf. Galatians 4.9, and 5.1, and Deissmann, *Light from the Ancient East*, 3rd ed., p. 323, note 10.

¹²¹ Rosh Hashanah I.15d.

¹²² Cf. Y. Megillah I.47, *מה ראיחם להקל באלו ולהחמיר באלו שאלו דברי תורה*, ואין דברי תורה צריכין חוק ואלו דברי סופרים וצריכין חוק. In a responsum dated 1836 and written in *לאשטוב* Rabbi Solomon Kluger rebuked a certain rabbi who permitted a *קוויטל* to be written on the Sabbath, and who sent a Jew

whether we are preserving genuine Jewish religious values or not. Thus we are inclined to be more lenient in our opinion on autopsy, or where the principle of **פיקוח נפש** is involved; on the other hand, we discern no valid reason to depart from the letter of the law with regard to the disinterment of the dead¹²³ just to flatter the vanity or minister unto the comfort of the living relatives. As matters stand we recognize the *futility* of declaring illegal the practice of mixed pews in the synagogues, neither are we convinced of the great religious value of the mingling of the sexes at religious services in our day. On the other hand, we are strongly opposed to the introduction of the organ, and use our best endeavors to discourage the practice. Our stand is based not merely in obedience to the letter of the law, but because of the highly dubious nature of the spiritual returns in exchange for the abandonment of a long cherished tradition. We are disinclined to insist upon the strictest interpretation of the prohibition of marriage during Sefirah, and have not objected in special circumstances to the use of Jewish physicians as Mohelim when they are properly qualified. Not all questions of law are equally as simple, as R. Jose ben Bun realized when he declared, **הלואי הוון כל שמועתא ברירין לי כהרא שכופין את הבן לזון את האב**.¹²⁴ In brief, the goal of interpretation is always to preserve the spirit as well as the letter of the law.

more than three parasangs on a horse belonging to a Jew on the Sabbath to a צדיק to pray for a sick Jew. Rabbi Kluger insisted that it is permitted to violate the Sabbath to cure the sick only **דרך טבע** but not **דרך נס**, for the rule is **בדרך טבע** **אין סומכין על הנס לכך הותר לחלל שבת בדרך טבע**, cf. *Budapest*, 1934, I, no. 87.

¹²³ Cf. **בלבול קשה למחים**, *Yoreh Deah*, 263.1 and Meiri to Mo'ed Katan 25a. ed. כתבי מכון הערי פישל, vol. I, 1937, p. 142. For the parallel in Roman Law, cf. *Pauli Sententiae* I.21.1. *Ob incursum fluminis uel metum ruinae corpus iam perpetuae sepulturae traditum sollemnibus redditus sacrificiis per noctem in alium locum transferri potest.*

¹²⁴ Y. Peah I.15d. In Roman law, too, a son is compelled to support his father, cf. *Digest* XXV.3.5.1. For this passage, cf. Albertario, *Studi di Diritto Romano*, I, Milan, 1933, p. 253, and E. Sachers, "Das Recht auf Unterhalt in der römischen Familie der Klassischen Zeit," *Festschrift Fritz Schulz*, I, 310–362 and Taubenschlag, "La *ὑποκομὴ* dans le droit des papyrus," in *Revue Internationale des droits de l'Antiquité*, Bruxelles, 1956, pp. 176–177.

In conclusion, let us in our deliberations, ever remember, despite any sharp cleavages of opinion that may ensue, that we are united in the great enterprise of preserving and cultivating the precious heritage vouchsafed to us from of old by our divinely inspired lawgiver and seers, as we are instructed in an ancient sermon: בעלי אסופות אלו תלמידי חכמים שיושבין אסופות אסופות ועוסקין בתורה: הללו מטמאין והללו מטהרין; הללו אוסרין והללו מתירין; הללו פוסלין והללו מכשירין; שמא יאמר אדם: היאך אני למד תורה מעתה תלמוד לומר כולם נתנו מרועה אחד אל אחד נתנו פרנס אחד אמרן מפי אדון כל המעשים ברוך הוא דכתיב וידבר אלהים את כל הדברים האלה (Ḥagigah 3b).

CANONS OF INTERPRETATION OF JEWISH LAW*

To do full justice to a theme so delicate and difficult as this would require a great deal more time and thought than I was able to give to it just now. Our ancient rabbis too, realized that the problem of interpretation should be approached by one who has much leisure for they said: "The Torah can be interpreted only by those who eat manna." Naturally, you are under the impression that your Committee on Law in answering questions that come before it is guided by some principles perhaps unavowed, and that its decisions are not due to chance, but that certain rules have at least subconsciously directed or controlled the conclusions it has arrived at. So far you are right. But there are no ready-made formulae by which the committee operates and perhaps none can be found. What I am going to say to you is merely by way of suggestion in the spirit of those ancient scholars who were referred to as *דנים לפני חכמים* (presenting proposals before the wise). I have launched upon this difficult adventure with no intention of exhausting the subject, for did not our ethical writers advise us "It is not your duty to complete the work."

Before approaching the main topic of interest, namely, the principles that should guide us in the interpretation of the Jewish law we shall embark with your indulgence upon a short cruise upon the high seas of our past, for then we shall understand better the forces that have determined the character of the traditions of our sacred Law. For even if history is merely like the light on the stern of a ship which illumines the path that has been traversed and throws no light upon the course ahead of us, as some philosophers maintain, there is still some satisfaction in these gloomy days in looking backward as the ship of Judaism

* An address delivered before the Rabbinical Assembly Convention in June 1935 and printed in the *Proceedings of the Rabbinical Assembly*, V (1933-1938), 170-188.

is sailing over dark and dangerous waters. Even if it may not help us to reach our destination in safety, is it not better than travelling entirely in the dark?

It is always advisable to define the term one employs, and perhaps a word about the meaning of Jewish Law may not be out of place. Modern students of law are at loggerheads as to the correct definition of Law and it would be difficult to disentangle from the mass of suggestions one that would apply to ours. I am reminded of an anecdote which, though a little irrelevant, still may be of some interest. The story is told that a German professor and an Englishman were once asked for the definition of an empire. When the German savant was approached he requested three days in which to prepare a proper reply. He consulted the catalogue in the libraries and looked up a host of references upon the subject and came back with a bulky dissertation on the question. The Englishman, however, answered curtly: "I can't tell you Sir, what an empire is, what I do know is that we have one." Similarly we may say, if we cannot define law, we know that we possess a legal system.

European and American law consists of regulations which aim at the preservation of order and peace in society and which derive their authority from the State. Jewish law, on the other hand, seeks to control the whole of man's life by a system of observances, both ritual and ceremonial, of ethical rules and civil jurisprudence. In early times, in all societies, religion, law and morals were undifferentiated. Thus, as late as the fourth century B. C. E. *nomos* (usually translated "law") embraced religious customs, as well as enacted precepts. "There is no system of recorded law, literally from China to Peru," says Maine,¹ "which, when it first emerges into notice is not seen to be entangled with religious ritual and observance. The law of the Romans has been thought to be that in which the civil and Pontifical jurisprudence were earliest and most completely disentangled. Yet the meager

¹ *Early Law and Custom*, London, 1883, pp. 5-6. Cf. also F. Schulz, *Principles of Roman Law*, Oxford, 1936, pp. 20-21. This view is challenged by A. S. Diamond, *Primitive Law*, London, 1935, pp. 2 ff., cf. also Mitteis, *Roemisches Privatrecht*, Leipzig, 1908, pp. 22 ff.

extant fragments of the Twelve Tables of Rome contain rules which are plainly religious or ritualistic."

A similar development took place in Jewish law. While the entire Pentateuch embraced both the ritual as well as the civil law, and was regarded as equally divine in origin, the Tannaim drew a distinction between the two² and took more liberty with the civil statutes than with the religious precepts. There were also a group of laws which pertained to both classes, such as the regulations concerning marriage, the priestly gifts³ and the Sabbatical year. These rules were considered essentially as religious laws, yet they belonged to civil law as well, inasmuch as they involved property rights.

How does the need for interpretation arise? Laws are necessarily expressed in human language, no matter what their imputed origin may be. Since laws do not explain themselves, their meaning must be declared by a judge, or court, or some authority which has the power to execute or enforce them. The Bible contains a large number of rules of a general nature, often vague and ambiguous in meaning. It also contains other laws intended for definite and narrowly defined situations. When a specific case came up before a judge which was not completely dealt with in the Law, then the necessity for interpretation appeared. In the Pentateuch several cases are mentioned where interpretation of the law was required. In Num. 15.32 it is recorded that a certain man was found gathering sticks upon the Sabbath day and he was put in ward because it had not been declared what should be done to him. The Rabbis⁴ explain that Moses did not know what kind of death penalty was to be inflicted upon him, as it was not clear to Moses how to interpret the verse "those who

² It seems that at a certain period in Biblical times questions of ritual (matters of the Lord) were decided by the priest and Levites, cf. Lev. 10.10-11 and Ezek. 44.23, whereas civil cases (king's matters) belong to the province of the judges, who were responsible to the king, cf. II Chron. 21.11. This matter is quite complicated and deserves a critical investigation. Cf. *J. Q. R.*, N. S., XXV, 522-523.

³ Whether the redemption of the first-born belonged to ritual or civil law was discussed by Strashun in his notes to Bekorot 49b.

⁴ Sifre, Numbers 114.

profane the Sabbath will surely be put to death." A similar problem, it is related, was presented by the blasphemer.⁵

Secondly, the question arose whether the daughters may inherit their father's estate when he died leaving no male issue. While undoubtedly there existed a number of rules governing succession in early times, there was no provision for this specific case. Hence when the daughters of Zelophehad raised the question before Moses, he was in doubt as to how to interpret the meager legislation on this point. The Rabbis⁶ were puzzled over the fact that the interpretation of these two laws should have escaped Moses, for according to their theory not only were general rules but details as well given to Moses on Sinai.⁷ Hence they were compelled to reconcile the difficulties on other theological grounds. En passant, it may be mentioned that according to the Midrash,⁸ Moses learned only general rules of law on Sinai, since his stay there was comparatively short.

What the canons of interpretation were in historical times is nowhere stated in the Scriptures and we are left to conjecture. In the administration of law and justice in the Biblical era we may take it for granted that where the law was not explicit, the judge deferred to custom and precedent^{8a} or decided in accordance with common sense and the notions of right and wrong that prevailed at the time. Thus, if Jacob had sued Laban for breach of contract for giving him Leah instead of Rachel, the judge would have undoubtedly decided that "it is not so done in our place, to give the younger before the first born."⁹ Solomon's

⁵ Sifra, ed. Weiss, 104, and Sanhedrin 78b, cf. also E. Lambert, *La Fonction du droit civil comparé*, I, Paris, 1903, pp. 231-279 who gives a full discussion of the development of early Jewish Law from the standpoint of the student of comparative jurisprudence.

⁶ Baba Batra 119a and Sifre Numbers, 133.

⁷ Sifra, Leviticus 25.1, cf. the reading of Maimonides in his Introduction to the *Commentary on the Mishnah*, ed. Hamburger, p. 5.

⁸ Exodus Rabbah 41.6.

^{8a} Cf. Baba Kamma 117a, *אי דינא ומרינן מינה*. For precedents in law, cf. e. g., Quintilian, V, 2.1 and *Inst.* of Justinian, I.2.6, and Jolowicz, "Precedent in Greek and Roman Law," *Bullettino dell' Istituto di Diritto Romano*, 46 (1939), 344-384.

⁹ Gen. 29.26.

famous decision in the case of the two women of bad repute, each of whom claimed the live child, was rendered in accordance with the dictates of practical understanding.¹⁰

When Jeremiah prophesied that the Temple would be destroyed like that of Shiloh and that the city of Jerusalem would be laid waste, he was seized by the priests and the prophets and indicted for committing a capital offense. His defenders who consisted of the elders of the people cited the precedent of Micah who had prophesied similar things during the reign of Hezekiah and yet had not been put to death.¹¹

However, we are not primarily concerned here with the interpretation of the Unwritten Law, which may be compared to the decisions of the King's Council in England. Our problem is mainly the interpretation of the Written Law. In post-exilic times when the Pentateuch was accepted as the fundamental law of the Jewish people, it became the sole object of interpretation, just as the Constitution of the United States is the supreme law of the land. In one place we read that Ezra the Scribe was the interpreter (סופר),¹² and the word is perhaps used in that sense in the Psalms¹³ where we read: "But unto the wicked God saith: What hast thou to do to declare (לקטר) my statutes." Similarly, the Rabbis explain this verse wherein they found an allusion to Doeg.¹⁴ In chapter 8 in the Book of Nehemiah we learn that Ezra had convoked an assembly of the Jews on the New Year's Day for a public reading of the Law. We are then informed that they read in the book of the Law of God with an interpretation and set forth the meaning and caused them to understand the reading. The word מפרש¹⁵ refers to an analysis of the law, i. e., Ezra supplemented with further details those rules which were

¹⁰ I Kings 3.16 ff. cf. also Meiri to Yebamot, ed. Albeck, p. 78, note 12.

¹¹ Jer. 26.7 ff.

¹² Ezra 7.11.

¹³ Ps. 50.16.

¹⁴ Cf. Sanhedrin 104b, as well as 99b and Ginzberg, *Legends of the Jews*, IV, 75, 84.

¹⁵ Cf. Berliner, *Targum Onkelos*, II, 1884, pp. 74-76. Cf. H. H. Schaeder, *Ezra, der Schreiber*, Tuebingen, 1930, p. 53, who defends the traditional view of מפרש.

very briefly formulated in the Pentateuch. On the other hand, *ושום שכל*¹⁶ alludes to the historical exposition of the laws which were interwoven with the records of Israel's history. In still another passage¹⁷ we read that Ezra had set his heart to interpret (*לדרש*) the Law of God. It is undoubtedly this verse that suggested to the Tannaim the use of the late Biblical word "Midrash" for the legal interpretation of Scriptures.

II

When we arrive at the Tannaitic period we note far reaching transformations in Jewish law that had taken place since Biblical times. We are not always able to trace this development for there are gaps in the sources. What we do know is that the change in social and economic conditions, the development of ethical notions and the growth of religious ideas have combined to produce many alterations in the Law. One of the chief factors in bringing about the adaptation of law to life was interpretation. In order to understand the hermeneutical rules of the Rabbis and the principles which influenced them in interpreting the Law, it is necessary to comprehend what ideas they entertained concerning the origin, the nature and purpose of the Law. According to them, the entire Pentateuch was verbally inspired¹⁸ and the Written Law was supplemented by oral communications which supplied the details for the general rules in the revealed Torah. These explanatory details were known as *פירוש*¹⁹ in contradistinction to genuine interpretation which was called *מדרש*. The consequences of such a conception were that the Law was immutable and that none of its rules could be abrogated or amended.

¹⁶ Cf. also Neh. 8.13.

¹⁷ Ezra 7.10. Cf. also Artur Weiser, *Glaube und Geschichte im Alten Testament*, Stuttgart, 1931, pp. 35–41, who gives a fine discussion of the historization of the Hebrew cult and law.

¹⁸ Baba Batra 15a, Sanhedrin 100b, Genesis Rabbah, 8.7 and Moore, *Judaism*, I, 239, and Bonsirven, *Le Judaïsme Palestinien*, I, Paris, 1935, p. 259.

¹⁹ Cf. Hullin 61a, Sanhedrin 87a, 88b, and Maimonides, Introduction to his *Commentary on the Mishnah*.

Only in case of an emergency could a law be temporarily suspended as was done by Elijah, and then only in order to further the observance of the law.²⁰ Otherwise the general rule obtained that the court had no right to make provisions that would under certain circumstances, in effect, make null and void a Biblical law.²¹

In the time of Philo there appeared a wave of antinomianism among the Hellenistic Jews. This was a logical consequence of the system of allegorical interpretation which was current among them. It is possible that some Jewish Gnostic sects were also imbued with these ideas. The hostility to the Law was most pronounced, however, in some early Christian sects, and we find Paul most violent in his opposition to the Jewish legal framework. Some faint echoes of these schismatic opinions are to be recognized in a number of Aggadic sayings,²² such as, e. g., that the commandments will be abolished in the time to come, or that merely the festivals or sacrifices will be abrogated in the future era. But there is no doubt that these views were repudiated by the Rabbis, and by no means did this conception ever represent the majority opinion of the synagogue.

Secondly, the Rabbis held that the Law was complete in itself. This notion finds expression in a number of Aggadic utterances. One beautiful legend has it that when Moses ascended to heaven he was introduced to R. Akiba who was deriving innumerable rules from each jot and tittle of the Torah^{22a} in the name of Moses.

²⁰ Yebamot 90b.

²¹ This is the view of Rabbah to which R. H̥isda was opposed, cf. Yebamot 89b and יד מלאכי, 102. Bet Din is not to be taken literally, as the official Bet Din lost its authority after the time of R. Judah II, see Ginzberg, *Jewish Encyclopedia*, I, 114–115. For the post-Talmudic statement that the sages have power to abolish a Biblical precept, cf. Tosafot, Yebamot 89b, s. v. כיון, Gittin 55a, s. v. ועל and כנסת הגדולה, כללי הפוסקים, no. 195. יד מלאכי, 295, and חרדושי אנשי שם to Alfasi on Shabbat, 10b. For the phrase לעקור (to abolish), cf. M. Pesahim, VI.2.

²² Cf. Ginzberg, *Jewish Encyclopedia*, I, 630–632; Schechter, *Some Aspects of Rabbinic Theology*, p. 4, and Chajes, חורר הנביאים, chapter עולם; Aptowitzer, *Parteiipolitik*, 116–123; Marmorstein, *R. E. J.*, 87; 203–205; Aptowitzer, *loc. cit.*, 88; 48–50; Abrahams, *Pharisaism and the Gospels*, Second Series, p. 126.

^{22a} Cf. Gaster, *The Titled Bible*, London, 1929.

In another passage it is asserted that any point of law that might ever form a subject for discussion between teacher and disciple has already been revealed beforehand to Moses on Sinai.²³ We may not infer from these remarks that Moses was familiar not only with the penetrating remarks of the *פרי מגדים*, but also with the subtle distinctions of the *ש"ך* and *ט"ו*. It is a rather poetic way of expressing their conception that the Law was revealed in all its ramifications to Moses. Similarly, many legal philosophers who belong to the analytical school of jurisprudence maintain that enacted or statutory law is complete and perfect and that all interpretation is merely the logical and mechanical application of pre-existing rules.

One of the great difficulties that confronted the Tannaim when they came to adapt the law to the needs of their day was the paucity of Biblical texts that were available for interpretation. This deficiency they made up by devising a number of hermeneutical rules. A list of such principles current in his day was first formulated by Hillel and is known as the seven rules of Hillel. These were expanded into thirteen by R. Ishmael and amplified into thirty-two by R. Eliezer ben R. Jose ha-Galili. In addition to these official formulations a vast number of other rules existed.^{23a} Some of these were grounded in logical reasoning, while many of them were arbitrary and even illogical. They had their basis in the conception that the Pentateuch was literally inspired, hence there were no superfluous words in the Divine Law. Even R. Ishmael's statement that the Torah speaks in the language of man²⁴ was merely a protest against the excessive

²³ Cf. Boaz Cohen, *Konteros Ha-Teshubot*, p. 23, note 2, and 'Erubin 21b, as well as the reading of Moses di Trani, *קריית ספר*, ed. Warsaw, 1902, p. 17b, note also that R. Yannai's statement (Y. Sanhedrin, IV.22a) that the decision on every future case of law was not revealed even to Moses; since the Halakah could be interpreted in forty-nine different ways, it was to be decided by the majority. Cf. Bacher, *Agada der Pal. Amoräer*, I, 40, note 5, and Ginzberg, *Legends of the Jews*, VI, 284.

^{23a} The Malbim in the introduction to his commentary on Leviticus entitled *אילת השחר* assembled a list of 613 hermeneutical rules, needless to say the number is arbitrary.

²⁴ Berakot 31b, cf. also Heinemann, *Altjuedische Allegoristik*, Breslau, 1935,

interpretation of the infinitive absolute, for he too believed that there was no redundancy in Scripture.

While the Rabbis held that the Biblical legislation was of celestial origin, they were not unconscious of the fact that much of Israel's laws were also the product of human wisdom²⁵ which they designated as חקנות. Thus it is of great significance to note that not only did the Tannaim institute ordinances, but even Moses²⁶ and the later Prophets were held responsible for such innovations. Similarly, the Rabbis realized that an important part of the law was the result of a spontaneous growth to which they gave their official sanction, i. e., the מנהגים²⁷.

The Rabbis of the Talmud were not narrow-minded legalists, as some bigoted Christian theologians^{27a} of the last century believed, but men endowed with vision, common sense, tact and intuition. They looked upon the Law as an instrument which helped men to fulfill the Divine Will and to attain to physical and spiritual happiness. (למען ייטב לך, "That it may be well with thee," as Scripture has it.)

Thus their interpretation was greatly affected by considerations as to the purpose and aim of the Law. Inasmuch as the Torah was to them in the words of Ezekiel "statutes of life,"²⁸

p. 74, note 11. Similarly, Philo held that there were no superfluous words in the Pentateuch, cf. Schuerer, *Geschichte*, III, 4th ed., p. 700, note 16.

²⁵ Cf. the remark in Ketubot, 22a, "Why quote scripture, it is common-sense," למען לי קרא סברא היא. Dr. Johnson said that "Law is the last result of human wisdom acting upon human experience for the benefit of the public," quoted by Pound in *Law and Morals*, 1926, p. 10, note 24.

²⁶ Cf. Ta'anit 27b, where a חקנה is ascribed to God Himself.

²⁷ It is interesting to note that חקנות and מנהגים are grouped together by Maimonides (in his Introduction to the *Commentary on the Mishnah* in direct opposition to the Talmud where the two are sharply distinguished. Perhaps he was influenced by the Greek writers. "It is significant," says Pound, "that Greek thinkers always couple custom and enactment, things which today we contrast." (*An Introduction to the Philosophy of Law*, p. 25).

^{27a} Thus Schuerer, in spite of his huge erudition, possessed a thoroughly distorted view of the essence and spirit of rabbinic Judaism. Unfortunately this is not the only instance where vast learning does not lead to understanding, not to mention sympathy.

²⁸ Ezek. 33.15.

it was natural that they found means of interpreting the Law in such a way as to permit one to wage war on the Sabbath in self-defense. They also evolved the principle that human life takes precedence over the observance of the Sabbath. Except in the case of the three cardinal sins, the Jew was never required to give up his life for the sake of religious precept. In this connection it should be mentioned that the Tannaim took into consideration the reason for the law and were swayed by it in their decisions. Thus we are told that R. Simon studied the reasons for the law.²⁹

The Rabbis did not ignore the realities of life, nor the social needs of the time by imposing too grievous a burden upon the people. A number of their observations betray a vast deal of psychological insight. Thus they remark that we may not make the law irksome.³⁰ Neither is it advisable to expect at all times the fulfillment of each law in its minutiae for the Torah was not given to angels,³¹ and in special cases where it is known beforehand that the enforcement of a particular rite is impractical, it is the better part of discretion to wink at its non-observance.³² They paid due regard to the fact that certain rules became obsolete and were no longer observed. Several passages may be cited to illustrate this point. They say that the law is superseded by custom³³ and elsewhere they assert: פוק חזי מאי עמא דבר, "Go out and notice the practice among the people."³⁴ In another passage we read: "If Elijah will come and say it is permitted to perform the ceremony of חליצה with a shoe we hearken unto him;

²⁹ Kiddushin 68b. According to a late chronicle the reasons for the Law were all given on Sinai, cf. Neubauer, *Mediaeval Jewish Chronicles*, I, 164. They were taught by Solomon, cf. 'Erubin 21b, Pesahim 119a and Sanhedrin 102a and Gruenhut, ספר הליקוט, IV, 45b, cf. also Wohlgemuth, *Das juedische Religionsgesetz in juedischer Beleuchtung*, I, 49 ff., and II, 34 ff.

³⁰ Cf. Ta'anit 14b, Y. Ta'anit I.7 and Tosefta Sotah XV.10.

³¹ Kiddushin 54a.

³² Tosefta Sotah XV.10 and parallel passages. According to the עיטור, this applies only to laws derived only by interpretation from Scripture, but not to those explicitly mentioned, cf. R. Asher to Betsah, IV.2.

³³ Y. Baba Metsia VII.1.

³⁴ Berakot 45a.

that it is not allowed to do so with a sandal, then we do not listen to him, because it is a general practice to employ the latter."³⁵

Already in early Tannaitic times we find that the two great schools of Shammai and Hillel were divided over the method of interpretation. The former as a general rule construed the Law strictly, whereas the latter adopted a liberal interpretation. In modern times it has been shown that some of the divergencies in their method of interpretation can be traced to the differences in the social and economic status of the members of the two schools. In a discussion between R. Ishmael and R. Eleazar ben Azariah concerning the question whether the law about the Sabbatical year is in force in Ammon and Moab, the former said to the latter "the burden of proof is upon you for you put a strict construction upon the law."³⁶ Later on a compromise view was suggested by R. Joshua ben Korhah, namely, that in cases of Biblical law we follow the more rigorous interpretation, but in rabbinical rules the lenient view should be adopted. This opinion became one of the guiding principles of the Amoraim in deciding law.³⁷

The Rabbis were aware of the importance of heeding the consequences of their decisions, for they often remark that one should not always promulgate a decision merely on the basis of a purely theoretical study of a legal question.³⁸ They insisted that only decisions that were handed down in connection with an actual case should constitute practical law.³⁹

When the Rabbis instituted new ordinances, such as חקנות or

³⁵ Yebamot 102a.

³⁶ Yadaim IV.2.

³⁷ Abodah Zarah 7a; M. 'Eduyot, I.5 and Y. Gittin I.2, cf. מלפסי חן ר"ן to Rosh Hashanah 944 and the statement of Samuel concerning the practice in regard to the laws of mourning in Mo'ed Katan 18b; cf. also *J. Q. R.*, N. S. XXVI, p. 71, note 9. In opposition to the view that it is preferable to point out the more lenient opinion (cf. Hulin 58a and Niddah 61b) the later authorities invoked a blessing on the one who adopted the more stringent practice, cf. *Tur Yoreh De'ah*, 65 end.

³⁸ Betsah 28b, Baba Kamma 30b.

³⁹ Boaz Cohen, *Mishnah and Tosefta*, Part I, p. 36.

חזירות, it was mostly with the aim to promote the observance of the Law, or as they put it to make a fence around the Torah. It was a fundamental principle with them that the continuity of Jewish Law must be maintained. Very often when they were at a loss to find a verse that lent itself to their interpretation, they would requisition some passage of Scripture which they were fully aware had not the slightest bearing upon the subject. This exegesis they characterized as **אסמכתא**.⁴⁰ For the same reason when they ordained new rules it was always in the spirit of Biblical tradition.⁴¹

In order to give stability, certainty and authority to the Law, they evolved the principle that one court could not annul the decisions of another, unless it was superior to its predecessor both in numbers and in learning.⁴² This was the way at least this statement was understood by the Amoraim and their successors. Theoretically such a principle would have put an end to all development of Jewish Law, especially since the conception that del Vecchio⁴³ so aptly termed "the myth of an ideal past" was prevalent, that the further back we go into antiquity, the greater are the scholars, and as we approach our own times learning progressively declines. As R. Johanan quaintly puts it "If the heart of the early authorities was as wide as the vestibule of the Temple, ours is as narrow as the eye of a fine needle."⁴⁴ Upon a great many later scholars such a view had the effect of stifling creative effort in the interpretation of the Law. In short, it

⁴⁰ Cf. Guttman, *Asmakta*, Breslau, 1924.

⁴¹ Pesahim 30b, c. Elijah Galipapa, יד אליהו, 92, who remarks that the principle (כל דחיקון רבנן בעין דאורייתא חיקון) applies only to the ordinances of the Tannaim, and not to those of the Amoraim.

⁴² 'Eduyot I.5, and my *Mishnah and Tosefta*, I, p. 18, note 90.

⁴³ *The formal Bases of Law*, New York, 1921, pp. 289-290. "The habit of looking upon the past as the seal of truth has long ruled. The result of this habit was that the new findings of justice were almost always announced as confirmations or restorations of law formerly upheld, but later somehow abrogated", *loc. cit.*, p. 290, cf. also Megillah 3a "they were forgotten and later reintroduced."

⁴⁴ 'Erubin 53a. For the theory of degeneration, cf. Taylor, *Primitive Culture* and Briffault, *Rational Evolution*, New York, 1930, pp. 2-3.

introduced the attitude of "I am unworthy."⁴⁵ This was partly counteracted by the Geonic principle that the practice is in accordance with the later authorities.⁴⁶

III

In post-Talmudic times the problem of interpretation assumed an entirely different aspect. For what the Bible was to the Tannaim and the Mishnah to the Amoraim, the Talmud became to the Geonim and their successors. It was the Geonim who by virtue of their prestige established the preeminence of the Talmud in every matter affecting law and ritual. Henceforth the Talmud became the indisputable authority in Jewish life⁴⁷ and was never challenged, except by the Karaites. The hermeneutical rules developed by the Tannaim and sparingly used by the Amoraim fell entirely into desuetude now, for the Talmud offered a vast amount of legal materials upon which the scholars could work.

With the completion of the Talmud, Jewish law reached its maturity. While the gulf between Biblical and Tannaitic legislation is enormous and the discrepancies in הלכה between the Tannaim and the Amoraim are many and significant, the departures of the Geonim and their תקנות and interpretations are, comparatively speaking, slight in importance. We do not mean to imply that the redaction of the Talmud arrested the development of Jewish law; by no means, but rather that the Talmud by the fullness of its legislation and by the importance of its own adjustments of Palestinian Law to Babylonian conditions has slowed down the pace of development of Jewish law and largely determined its distinguishing characteristics.

Following in the footsteps of the Geonim, Abraham ibn Daud,

⁴⁵ For *איני כדאי*, cf. Baba Batra 165b. This phrase, however, is becoming in the mouth of the Cantor when he chants the *הנני העני ממשע*.

⁴⁶ Cf. *Konetros Ha-Teshubot*, pp. 28-29.

⁴⁷ For the authority of the Talmud, cf. *Konetros Ha-Teshubot*, pp. 17-26.

Maimonides, R. Asher, R. Solomon Luria and Elijah Vilna⁴⁸ confirmed the primacy of Talmudic authority. The purpose of codification of the Law was largely a matter of expediency. The Talmud, itself being no code, did not contain any systematic arrangement of the הלכה and even the greatest of scholars sometimes had difficulty in finding the Law. In addition, the codes embodied some innovations in the way of local custom in conformity with current practice. In theory, the codifiers were merely expounders of Talmudic law, but not ultimate authorities in themselves. Thus R. Asher rebukes certain scholars who decided questions of Law solely upon the basis of the *Mishneh Torah* of Maimonides without recourse to the Talmud. As a matter of fact, many codifiers were accepted as actual authorities in their respective countries, whereas some of the greater *halakists* enjoyed this recognition even beyond the borders of the land of their abode. Not only in Egypt, but even in Syria, Yemen, Persia and the Island of Rhodes did scholars strictly adhere to the *Mishneh Torah* in giving decisions on Jewish law.⁴⁹ At a later period, the *Shulhan Aruk*, contrary to the intent of its author, and after considerable opposition on the part of a great many scholars, was ultimately established as a firm authority after it had been brought into conformity with Polish custom by the glosses of R. Moses Isserles. R. Zewi Hirsh Eisenstadt⁵⁰ remarks that although R. Samuel Edels once objected to deciding according to the *Shulhan Aruk*, it is proper to do so now, inasmuch as it is supplemented by the commentaries of the ש"ך, מנן אברהם and the ט"ז.

⁴⁸ Cf. Ginzberg, *Students, Saints and Scholars*, p. 277, note 40, Yatzkan, *Rabenu Eliyahu mi-Vilna*, p. 101.

⁴⁹ R. Joseph Karo was asked whether it was permissible to compel a community which had accepted Maimonides as an authority to follow the decisions of the ר"י or other later rabbis. To this he replied that Maimonides was the greatest of the codifiers and that the communities in Palestine, Arabia and Northern Africa were guided by his code (אבקה ריכל, no. 32). R. Moses Benveniste received a letter from a scholar in Safed in 1653 who speaks of a large city with many scholars who accepted the *Yad* as their authority from time immemorial, cf. שני טשה, I.4.

⁵⁰ *Yoreh Deah*, 242, 14.

It was a cheap intellectual pastime of the Reformists of the nineteenth century to rail at the *Shulhan Aruk* which they accused of straightjacketing Jewish life. This is far from being true, for the commentators allowed themselves considerable freedom in interpretation. Neither would the *Shulhan Aruk* ever have enjoyed the prestige it did, had it not been for the fact that it did answer the needs of the time. Codification of the Law does not check development, it merely conceals it. Looking at the matter historically, we must admit that the *Shulhan Aruk* with all its deficiencies is a remarkable handbook of Jewish law and as the work of one of the greatest Talmudists of all time it should carry all the weight that is commensurate with such an illustrious authority.

In the Middle Ages there was undoubtedly a tremendous reverence for the book *per se* to which undue authority was ascribed regardless of its author, and a host of customs and rites mentioned even in non-legal sources received the sanction of great authorities. Thus an inquiry was addressed to R. David ibn Zimra as to the origin of the custom to take off the *tefillin* before *Musaf* on *Rosh Hodesh*. The learned rabbi replied that he found no reference to this custom in the Talmud or in the codes available to him, but that it was mentioned in ספר אלקנה. Accordingly, he followed the custom ever since he noticed it in that book. He then goes on to say that Elkanah is worthy that we take off our *tefillin* for his sake a quarter of an hour earlier.⁵¹

The Rabbis had to contend with many laws that were fast becoming obsolete. Of particular interest is the fact that Enoch ben Judah, a Bavarian rabbi of the seventeenth century, deplored the disregard of the prohibition of shaving in his country by the young men who justified it on the ground that it is permitted for unmarried men to remove their beard with a razor. The pious rabbi in his endeavor to put a stop to this flagrant violation of

⁵¹ *Responsa*, Leghorn, 1652, no. 80. For Ibn Zimra's attitude towards the question of authority in Jewish Law, cf. Zimmels in the *Bericht des Juedisch-theologischen Seminars*, Breslau, 1932, pp. 28-38.

Biblical law, issued an order forbidding any one guilty of this misdemeanor to be called up to the Torah.⁵²

How the change in the environment⁵³ affected the Rabbis' interpretation of the Law may be illustrated by the following. According to the Mishnah, it is prohibited to derive any benefit from wine of Gentiles because it is presumed that it had been used for libation in idolatrous worship. Rashi⁵⁴ on the authority of the Geonim permitted one to derive benefit from all wine of Gentiles on the ground that libation is not a Christian practice, and moreover, they were not considered as idolaters. Maimonides took a similar stand in regard to the Muslims.⁵⁵

When a new problem arose for which there was no precedent, the Rabbis sought to interpret the Law by means of analogy or derive it by logical reasoning from pre-existing rules. A case in point is a question⁵⁶ that came up before R. Shneur Zalman, rabbi in Goldingen, Kurland in 1876. A man convicted of larceny was sentenced to imprisonment in Siberia. Thereupon the wife demanded a divorce, but the husband refused to grant it. The rabbi held that it was permitted to compel the husband to grant a bill of divorce on four grounds, for his imprisonment would entail non-support, forced absence from his home, failure to perform his marital duties and finally, inasmuch as he was guilty of moral turpitude, he was in a legal sense worse than an apostate. In Russia under the old regime, where rabbinical

⁵² ראשית בכורים, Frankfurt 1708, p. 27b, cf. also אבן העזר to פתחי תשובה 42, 5, note 18.

⁵³ Often the expression "and now (המידנא) it is permitted" is used to imply that different conditions are prevailing, cf. for example, Rosh Hashana 27a and *Yoreh Deah*, 159. Many other such passages were collected by I. Loew in *H. U. C. A.*, XI, 1936, pp. 193–206. In Roman Law, too, the phrase *Hodie*, "today, nowadays", is found in the *Digest* and the *Institutes* to characterize some of Justinian's innovations, cf. Berger, *Encyclopedic Dictionary of Roman Law*, 1953, p. 487.

⁵⁴ Cf. Tosafot, Abodah Zarah, 57b, s. v. לאפוקי and also 2a, s. v. אסור. Cf. also the references in תשובות רש"י, New York, 1943, p. 392.

⁵⁵ Cf. *Forbidden Foods*, XI, 7 and his responsa, ed. Freimann, p. 350.

⁵⁶ This Responsum is printed in Israel Salanter's *אבן ישראל*, Warsaw, 1883, pp. 90–92.

jurisdiction in religious matters was recognized, the divorce could be granted as a forced *Get*.⁵⁷

In the responsa, two principal methods of interpretation are represented. The historical method consists of the rabbi's finding the Law in the Talmud and tracing it throughout the פוסקים. Or vice versa, he discusses first the explanations of the later פוסקים and gradually goes back to the Talmud. A most remarkable historical presentation of the details of Jewish law is given by Karo in his commentary on the *Tur*.

The analytical method of interpretation found in the responsa constitutes the presentation of a detailed analysis of the general question raised by the inquiry before discussing the particular point at issue.

A number of compilations entitled כללי הפוסקים⁵⁸ contain precise definitions of legal terminology and deal with the principles of interpretation followed by the codifiers. Several of the most important rules only can be enumerated here. Thus R. Joseph Kolon asserts that we may not derive any laws by an independent interpretation of Scripture.⁵⁹ In case of conflicting views there were more or less accepted standards as to the relative importance of the various authorities. Thus the opinion of the Tosafists carried more weight than that of Maimonides. In general, the Law was decided upon in accordance with the consensus of opinion of the authorities (הסכמת הפוסקים). Karo informs us that in his compilation he considered Alfasi, Maimonides and R. Asher as the standard authorities and generally accepted as final any decision upon which two of the triumvirate agreed. This procedure was however, criticized by R. Solomon Luria who maintained that the views of a preponderant number of scholars were weightier than the opinion of the two.

⁵⁷ M. Gittin IX.8; cf. Juster, *Les Juifs dans l'Empire Romain*, II, 57, note 5.

⁵⁸ Some of the more important are the כללים at the end of Moses Ibn Ḥabib's נט פשוט, Benveniste's כנסת הגדולה, Malachi Cohen's יד מלאכי, Lampronti's פחד יצחק, Azulai's יעיר און, Elijah Hazan's חקל וטוב לב, Palagi's כל החיים and Medini's שדי חסד. Cf. also Jellinek, קונטרס הכללים, Vienna, 1878, and Bruell, *Jahrbuecher*, IV (1879), 189–192.

⁵⁹ *Responsa* 139, ed. Venice, 1519, p. 153a, cf. יד מלאכי, no. 144.

IV

What principles should guide us in interpreting Jewish Law today? Interpreting law presupposes a mental picture of what we are doing and why we are doing it. What is it that we do when we interpret law? To what authorities do we turn for guidance? To what extent are we influenced by them?; and in case of conflicting opinions how do we choose between them? Shall we be consistent in our principles? What shall be the nature of our interpretation? Shall it be supple or inflexible, liberal or literal, lenient or severe?

In order to answer these questions we need some philosophical thinking about Jewish law. For the analysis of the process of interpretation involves an exposition of the origin, nature, development and aim of law. These are problems in philosophy.

It is a fundamental doctrine of Judaism that our Law is divinely revealed.⁶⁰ For us the scriptural law is the expression of the divine thought and purpose. To quote a modern religious thinker,⁶¹ "Without pretending to define inspiration or determine the mystery of its operation, we may, I suppose, say what we mean is an influence which gave to those who received it a unique and extraordinary spiritual insight, enabling them thereby, without superseding or suppressing the human faculties, but rather using them as its instruments to declare in different degrees, and in accordance with the needs or circumstances of particular ages, or particular occasions, the mind and purpose of God."

Ours is an age primarily interested in historical research and

⁶⁰ Ginzberg first called attention to a most remarkable passage which is unique in Jewish literature by an unknown chronicler to the effect that Moses used literary sources for the historical part of the Pentateuch. Cf. *Legends*, VI, 48.

⁶¹ Driver, *Sermons on the Old Testament*, New York, 1893, pp. 146-147. Spinoza, too, observes: "Men were filled with the spirit of God, means that the prophets were endowed with a peculiar and extraordinary power, and devoted themselves to piety with especial constancy . . . and that the law which shows His mind and thought is called His spirit." Cf. *Theologico-Political Treatise*, chap. I, New York, Dover Publications, 1951, p. 24.

comparative studies in which the investigation of the origin of institutions and laws plays a dominant role. Despite the fact that parallels to many rites and customs prescribed in Scripture may be found among other peoples,⁶² we must not lose sight of the fact that the Biblical ceremonies and laws have been transformed by the inspired writers and endowed with such great spiritual meaning that they cannot but evoke in us feelings of veneration. "Human beings being what they are," says Balfour,⁶³ "no moral code can be effective which does not inspire in those who are asked to obey it, emotions of reverence, and that practically the capacity of any code to excite this or any other elevated emotion cannot be wholly independent of the origin from which those who accept that code suppose it to emanate."

When we say that scriptural law is eternal and immutable we do not imply that it is something fixed and settled and not subject to change or development.⁶⁴ It means that we cannot attempt deliberately to set up law or to promulgate new rules that cannot be derived from traditional law.⁶⁵ It is true, as was previously mentioned, that the Rabbis themselves instituted new ordinances and gave approval to certain customs that arose spontaneously among the people, but in no event would they allow an abrogation of Biblical law.

In a certain sense it is important to understand the goal of the Law. Law functions for the purpose of attaining certain ends. The aim of Jewish law is, as our ancients taught us, a means whereby the individual obtains physical and spiritual happiness. At the same time we recognize too that Jewish law has been the

⁶² As was already noticed by Maimonides who in general anticipated the results of modern research in comparative religion, cf. *Moreh Nebukim*, III, 33. This fact did not escape the attention of Robertson Smith, cf. *Religion of the Semites*, London, 1914, p. 343. Maimonides in turn was most likely influenced by Al-Beruni who made copious comparisons between the customs of different religions. Cf. M. Sanhedrin VII.3, *מדות הנדרגין היו מחזין את ראשו*, and the Talmud, remarks, *loc. cit.* 52b, *כיון דכתיב, ואי. ט. ש. 11a*, cf. Tosafot, Abodah Zarah 11a, s. 11a.

⁶³ *Foundations of Belief*, London, 1895, p. 13.

⁶⁴ Ginzberg, *Students, Scholars and Saints*, p. 105.

⁶⁵ Cf. *Moreh Nebukim*, III.41.

most conspicuous and efficient instrument for the preservation of Jewish society.

There is no need to labor the point that there is a widespread disregard of Jewish law in our country today, and what is even worse, there is a marked disrespect for our traditional rites and customs. The main problem that confronts us is: What should we do about it? There is one group who holds that all departures are dangerous, as that great Hungarian rabbi, Rabbi Moses Schreiber gracefully expressed it, "Innovations are Biblically forbidden."⁶⁶ They are content to believe that somehow matters will right themselves as they did in the past. This policy of *laissez faire* is not shared by another minority group who is convinced that the problems we must solve today are incomparably greater than those we had to contend with in the past. The solution of our problems due to changed intellectual temper, economic environment and social conditions is not to be attained by the slow and inadequate method of interpretation, which at best can only patch the fabric here and there. "What good are the Rabbis," averred some ancient skeptics, "they never permitted ravens, nor prohibited doves."⁶⁷ Accordingly, there must be a free setting up of new premises; and laws that do not meet with current approval should be declared null and void. In short, the problems must be met by pruning and pruning unsparingly all the dead branches of the tree of Judaism.

Then there is a third group who, I venture to believe, constitutes the majority. Fully cognizant of the sore plight of Jewish rites and ceremonies, this group maintains that not only is legislation contrary to Jewish tradition, but it is a perilous adventure. It clings to the time-honored method of interpretation. Frankly speaking, I am convinced that only through creative interpretation shall we be able to solve our present-day problems in the spirit of the great exponents of historical Judaism, such as Frankel, Graetz and Schechter.

What do we mean by interpretation? In modern times jurists have evolved many theories concerning the nature and function

⁶⁶ חדש אסור מן התורה. A play on חדש meaning new grain and also innovations.

⁶⁷ Sanhedrin 101a.

of interpretation,⁶⁸ but these need not detain us here. Suffice it to say that our chief difficulty today is not that the Law is vague and ambiguous and that its meaning must be determined. On the contrary, in many cases the Law is quite definite and precise, but is out of harmony with modern life.

Before stating the principles that should guide us in interpreting law, we wish to set forth what are the ends we seek. For there is no wisdom in the choice of a path, unless we know whither the road leads. Our aim is to preserve as much as possible of the genuine Jewish law and custom as is compatible with modern conditions. The character of Jewish law and tradition as embodied in the *Shulhan Aruk* was well suited to the needs of the Jews who dwelled in the small towns of the ghetto, shut off from every intellectual and social intercourse with the outside world and engaged in petty business. The sudden influx of millions of Jews within a comparatively short time into an environment where they mixed freely with non-Jews, partook of modern education, became residents of large cities, has had a devastating effect upon Jewish observance. These are facts with which we must reckon, if we wish to rehabilitate traditional Judaism.

As guiding principles we must recognize:

1. The indisputable authority of the Talmud⁶⁹ and the binding character of the Codes.

⁶⁸ Cf. Vinogradoff, *Common Sense in Law*, pp. 122–127, and Allen, *Law in the Making*, Oxford, 1927, pp. 61–103, and especially, F. Geny, *Méthode d'Interprétation, et Sources en Droit Privé Positif*, vols. I–II, Paris, 1919.

⁶⁹ There are a few cases where the scholars consciously deviated from the Talmud. Thus, e. g., R. Hai decided contrary to Nedarim 27b that אסכתא is invalid (cf. *Konteros ha-Teshubot*, p. 19, note 5). Perhaps he did so because this treatise was redacted in Pumbeditha and consequently it enjoyed less authority than those who came from Sura, cf. Rabinowitz in *Yerushalaim*, ed. Luncz, X, 1914, pp. 252–253. Similarly, it is stated in אור זרוע, I, 88, that it is our custom to read ויחל on fast days which is not in accordance with the Talmud. Karo in his Responsa מבקש ריכל, no. 28 explained this deviation on the ground that a little more liberty is allowed with the liturgy than with the ritual law proper, איסור וזהר. In several instances we follow the minor treatises over against the Talmud (cf. the references given by Higger, *Treatise*

2. When a question is raised we must seek to understand the general aim and spirit⁷⁰ of the Law. This is to be accomplished by a profound and accurate research into the history of Jewish law, for without such studies no philosophy will amount to much, nor will mere sociological thinking do.

3. We should follow as a general rule the consensus of opinion of the codifiers.

4. In exceptional cases only we might consider the advisability of following the minority view of the פוסקים.

5. We should give thought not only to the legal aspect of the question, but also to Jewish sentiment and to the consequences of our decisions.

6. We must bring to bear with full force the machinery of interpretation to contrive means to alleviate those who are caught in the network of the law. I have reverence to some aspects of the law of divorce. We dare not remain indifferent to these problems. Neither will it be well to justify these hardships on the ground that they are the culmination of a long historical process.

7. We must recognize that there are limits to genuine interpretation and that we cannot attempt to remedy all evils. "As I was rewarded for interpreting the Torah," said an ancient Rabbi, "so shall I be rewarded from abstaining therefrom."⁷¹ For many situations are due to economic, political and social causes as beyond our control as are the movements of the planets. We could never permit shops to be open on Sabbath, and yet it is

Semahot, p. 11). But the אור זרוע (I, 754, p. 218b) insisted upon the prime authority of the Talmud. En passant, it may be remarked that איסורא included ethical laws as well, cf. הלכות דעות to כסף משנה, VI.7.

⁷⁰ Cf. Montesquieu, *Esprit des Lois*, and Boaz Cohen, "Letter and Spirit in Jewish and Roman Law," in *Kaplan Jubilee Volume*, 1953, pp. 109-135.

⁷¹ Pesahim 22b, cf. also the statement "there is need, but there is no remedy" in Berakot 15b and parallel passages, as well as R. Akiba's statement, "do we draw an analogy between a case where there is an alternative and where there is none," Menahot 82a and Tosafot, Bekorot, 56a, s. v. וטה; cf. also Yebamot 61b and Hullin 11b, and פחד יצחק, s. v. אפסר.

too much to expect an increase of Sabbath observance, as long as our economic system actually forces many of our people into desecrating the Sabbath.

8. When we apply the principle, *Go out and notice the practice among the people*, we must ever remember that this maxim applies merely to divergences in customary practices among people who are *שומרי מצות* and *יראי שמים*.

9. We should aim to interpret merely for American Jewry, and not for "catholic Israel" who, as Zangwill wittily remarked, is eternally protestant.

10. Finally, we must consider whether we should dedicate ourselves to the implacable ideal of consistency, or rather make occasional departures from our principles in particular instances. In an illuminating discussion of this point and its bearing upon modern law, the late Justice Cardozo wrote: "It is well enough to say we shall be consistent, but consistent with what? Shall it be consistency with the origins of the rule, the course and tendency of its development? Shall it be consistency with logic or philosophy in the fundamental conceptions of jurisprudence as disclosed by analysis of our own system? Are all these loyalties possible? Are there not times when we must bend symmetry, ignore history and sacrifice custom in pursuit of other and larger ends?"

Whatever we do, we must ever strive to cope with the problems of Jewish law in the spirit of Maimonides, Ibn Adret, R. Asher, Joseph Karo, and R. Isaac Elhanan.

THE *SHULḤAN ARUK* AS A GUIDE FOR RELIGIOUS PRACTICE TODAY*

I

An ancient Palestinian scholar, R. Levi by name, contrasting the mood of Israel in an earlier and more benign period with that of his own, observed¹ that in times of prosperity the Jews were in a frame of mind to listen to a discourse on Mishnah, Halakah and Talmud, but now, in an epoch of penury and sickening persecution, they prefer to hear sermons of encouragement and consolation.²

It is therefore with considerable misgivings that I undertake to address you upon a problem of Halakah, at a time when the existence of a great part of our co-religionists beyond the seas is threatened more seriously than ever before, and entire Jewish communities that once were flourishing, are being pauperized and exterminated in a foul manner by demented hooligans sitting pretty in the seats of the mighty. It is but natural that we should be preoccupied foremost with the salvaging of this human wreckage floating in a cold and unfriendly globe where no one cares or inquires, *אין דורש ואין מבקש*,³ as the prophet neatly puts it. And yet in a time of peril such as this, it is imperative more than ever to turn to our ancestral heritage for aid and comfort. Need I remind you of the splendid advice proffered by R. Akiba shortly before his martyrdom: "Now when we are occupied with the

* Address delivered at the Rabbinical Assembly Convention on July 5, 1939 and printed in the *Proceedings of the Rabbinical Assembly of America*, VI (1940) 115-145.

¹ לשעבר היתה פרוטה מצויה והיה אדם מתאוה לשמוע דבר משנה והלכה והלמוד ועכשיו שאין הפרוטה מצויה וביותר שהן חולין מן השעבוד אין מבקשין לשמוע אלא דברי ברכות ונחמות.

² Canticles Rabbah II. 15 (ed. Vilno, 15a).

³ Ezek. 34.6, cf. also Sotah 49a.

study of the Torah we are at such an impasse; how much worse would it be if we desisted from study."⁴

As the Chairman of your Committee on Jewish Law for many years, it was my honorable and congenial task to study various questions of Jewish law and observance that sprung up in this country. I am now fully persuaded that the time is ripe for us to clarify the nature of those problems and to offer some tentative and provisional suggestions that might prove of assistance in wrestling with uncertainties and perplexities in our time.

It requires little argument to demonstrate that American Jewry is faced with a grave religious dilemma. The number of our people who are influenced in their religious life by Jewish traditions is diminishing. Our Jewish legacy is woefully ignored and neglected in this distracted and industrialized society of ours ruled as it is by a materialistic and mechanistic philosophy.

As we can only meet the situation by a candid analysis and a right diagnosis, before venturing a prescription may I state what appears to me to be some of the salient factors that operate in favor of an increasing indifference to Jewish ceremonials.

First, there is the widespread ignorance of the masses both young and old, regarding matters of faith and religious practice. Ignorance breeds not only contempt but fathers feelings of inferiority and self-hate. Judaism, like nature, abhors a vacuum.

Second, the business of providing for the means of subsistence militates against the observance of the Sabbath, the festivals and the dietary laws. We know that these are our last line of defense, and when it is broken through, Judaism has suffered a serious setback.

Third, there are impediments to observance generated by social intercourse. How awkward and inopportune to decline an invitation to dinner at the house of an eminent Gentile or an opulent non-conforming Jew, just because the *Shulḥan Aruk* restricts your menu. Furthermore it is more normal to comply with the social etiquette of our friends, than to be finicky in habits of diet, freakish about customs regulated by the calendar, or obstinate in matters settled by the law of the land.

⁴ Berakot 61b.

Fourth, there is a manifest maladjustment of Jewish ritual to the contemporary American scene. In the course of the past, minutiae of ritual have multiplied to a degree that even a sympathetic person uninitiated in the intricacies of Jewish law, stands flabbergasted at the number of prohibitions, is unable to distinguish between the cardinal and the ephemeral, and is often constrained to forsake altogether what is fundamental in religion while clinging to what is trivial.

Fifth, an imperious challenge to Judaism is offered by the rival teachings of science and philosophy. The younger folks who received a liberal or professional education in the schools and universities, are asking questions that cannot be answered by mere citation of authorities. There is one particular question which is being asked even more insistently than ever before. Why should I observe this or that ceremony and what is its religious or social significance? There is no simple answer to such a vital query. But I am not called upon here to attempt a response. Suffice it to say that people pay no allegiance to principles they disavow, nor do they observe forms of behavior which evoke no emotional response or intellectual assent in them.

These factors which I have isolated for the sake of analysis do not operate singly, but as in the case of other situations that influence human conduct are interlaced and interact upon each other. The problem differs considerably in the various communities. In the large cities and in the very small Jewish settlements, religious observance is at a minimum, and ignorance of Judaism at a maximum, and a mere semblance of or a pretence to Jewish knowledge is sometimes at a premium. A community fortunate enough to have some wealthy or learned Jews, enthusiastic lay leaders, or a competent rabbi will present a different picture from one where one or several of these circumstances are absent.

No matter what the causes be, observance of Jewish rites is decidedly on the decline, and loyalty to Jewish traditions definitely on the wane. Looking at the scene at close range it is disappointing indeed, especially for us who have an abiding faith in the spiritual value of the Jewish religion. However a historical perspective will enable us to estimate the situation in a better

light. While it is true the precepts of Judaism were never set aside with so much abandon and blatancy as now, there are not a few records registering the transgression of Jewish customs even in early times. We know for example that in the Talmudic epoch and even later, the wearing of Tefillin was not observed by the throng and was esteemed lightly.⁵

Judah Leib Pochawitzer, a native of Pinsk, living in the seventeenth century gives us some interesting glimpses of life in Lithuania of his time.⁶ This celebrated preacher whose sermons wielded a great influence upon people of his day, was very much alarmed by the fact that many people were unmindful of Jewish observance and customs. Not only did people indulge in idle chatter during the services in the synagogue, or at home on the Sabbath, or hire Ḥazzanim who understood not the meaning of the prayers, but were guilty of much severer offenses, such as lending money on usury without availing themselves of the *Heter 'Iska*, and even kept their liquor stores open on the Sabbath.⁷ This preacher advocated as a remedy among other things that the masses devote themselves more intensely to the study of the *Orah Ḥayyim*. He himself had published a commentary upon this part of the *Shulḥan Aruk*, drawing heavily upon the *Zohar*, *Ari*, *Shelah* and other mystical writings. R. Judah Ashkenazi, the author of the *Be'er Heteḇ*^{7a} has made frequent use of this commentary.

⁵ Boaz Cohen, *Konteros ha-Teshubot*, p. 4, note 2.

⁶ Cf. דברי חכמים, Hamburg, 1692, 3a of the introduction.

⁷ For the *Arenda*, as he terms it, cf. Gessen in the *Russian Jewish Encyclopedia*, s. v. "Arenda" III, 74–87, for traffic in wine, cf. Voltke, s. v. "Vinniye Promisle" *loc. cit.* V. 609–14, and for the violation of Shabbat see Dubnow, פנקס המדינה, Berlin, 1925, Index s. v. חילול שבת and R. Joel Sirkes to *Orah Ḥayyim* 261 towards the end.

^{7a} It is noteworthy that four scholars have written commentaries on the *Shulḥan Aruk* entitled *Be'er Heteḇ*. The first is R. Isaiah ben Abraham (a grandson of David ha-Levi, author of the *Taz*), who wrote a commentary on *Orah Ḥayyim*, printed in Amsterdam, 1708. The second is Judah Ashkenazi who wrote a commentary upon the first three parts of the *Shulḥan Aruk*. R. Isaiah's commentary is cited by Judah Ashkenazi as באר היטב אשר לפני. Cf. e. g. *Orah Ḥayyim* 196, 1 and 3; 202, 6; 235, 2; 266, 13; 289, 1; 298, 11. The third is R. Zechariah Mendel ben Aryeh Löb of Cracow who wrote on the

In modern times however, the problem of observance has assumed a much graver aspect. With the advent of emancipation and consequent enlightenment the very foundations of the Jewish religion were subjected to severe criticism. Both the reformers of Germany and the Maskilim of Russia⁸ looked upon the Talmud and the *Shulhan Aruk* as a barricade obstructing the normal progress of Judaism. The German radicals, overjoyed over the admission of the Jews to Gentile society felt it their bounden duty to throw off the shackles of the Ghetto, for they considered traditional observances like an inflamed vermiform appendix in the body politic that required surgical treatment. "If thine eye offend thee, pluck it out."

In their opinion Israel would cease to be the suffering servant as soon as his religion was stripped of its nationalistic garb and particularistic tendencies, and it became a purely universal religion. After dropping all manners and customs that set him off from his Gentile neighbor, the Jew would remain a passive, if not a quiescent propagandist of ethical monotheism. One of the leading protagonists of reform went so far as to declare that only the ethical principles of the Torah are binding. In very truth, behold, a belated species of Pauline Judaism! 'Tis strange that from sheer joy of emancipation, the instinct of self-preservation forsook these misguided rabbis. They overlooked with reckless abandon the survival value of age-long traditions and practices.

We now know how premature was their jubilation over emancipation and how feeble a prophylaxis assimilation was against the bacillus of anti-Semitism. By a curious irony of fate, in that self-same country where the Jews attempted to demonstrate most fervently their solidarity and affiliation with the German people,^{9a} they provoked the fiercest resentment, and Jew-hatred

Yoreh De'ah and *Hoshen ha-Mishpat*. The fourth is R. Moses Frankfurter of Amsterdam who commented upon the *Hoshen ha-Mishpat*.

⁸ In order to wean the Jews away from the Talmud the Russian government commanded Leo Mandelstamm to translate the *Mishneh Torah* into German and ordered that it be studied in the Jewish schools, cf. P. Kon in *Iwo Blaetter*, XIII, 1938, p. 579.

^{9a} Note what Heine wrote: *Es ist in der That auffallend welche innige Wahl-*

made its most ugly appearance. In some respects the Jews of America are now facing a situation not unlike that which confronted their emancipated co-religionists of Western Europe a century ago.

American Jewry is today divided into three main groups, holding different notions about the principles and precepts of Judaism. The Reform wing deriving its main inspiration from Germany, transcended the founding fathers in their disparagement of Jewish ritual. While some of the German prototypes were merely decrying the disharmonies and shadows of the *Shulḥan Aruk*, their spiritual heirs in a freer clime abolished not only the rabbinical enactments but repealed the Law and the Prophets.

It is instructive to recall the interesting debate at the Augsburg Synod in 1871 provoked by Doctor Wasserman's proposal that the *Shulḥan Aruk* be thoroughly revised in order to bring Jewish ritual in unison with the spirit of the time.⁹ This suggestion met with little sympathy at the conference. One rabbi maintained that revision would imply recognition of the *Shulḥan Aruk* as an authority which it was not, and furthermore, new codification would stifle further development in Judaism. Another held that so much of the *Shulḥan Aruk* has become obsolete that little would remain after a revision, aside from the fact that only the Decalogue and what may be derived therefrom formed the basis of Judaism. Still another speaker thought revision a futile task because it would not be lasting inasmuch as in two or three centuries another revision would be necessary.

The most pointed attack upon the *Shulḥan Aruk* was made by the twenty-eight-year-old Nehemiah Bruell, a disciple of Geiger and a scholar of high attainments. "We regret," says Bruell, "that the fluid word of the Talmud codified in the

verwandschaft zwischen den beiden Völkern der Sittlichkeit, den Juden und den Germanen herrscht. quoted by A. Kohut, *Geschichte der Deutscher Juden*, Berlin, s. a., p. 5. Even such a good Jew as Hermann Cohen was misled by the Teutons as is evident from his essay, *Deutschtum und Judentum*, Giessen, 1915.

⁹ *Verhandlungen der zweiten israelitischen Synode zu Augsburg 1871*, Berlin, 1873, pp. 159-170.

Shulhan Aruk has become petrified and we would not like to see a new edition and revision of this book, a proceeding which could only be injurious to the development of Judaism. Every new revision is a recognition of the book, which as a religious code, has no value for us. I move that we should declare openly that the *Shulhan Aruk* has no significance for us as a religious code, since the views written down in the *Shulhan Aruk* never were our theoretical conviction, and never should be such."¹⁰

Commenting upon Bruell's remarks, Philipson wrote, "Had the Synod acted upon this suggestion, what a service it would have rendered! To have declared in open assembly that the *Shulhan Aruk* has no significance for the Jew as a religious authority would have been sufficient to have made this Synod ever memorable in the history of Jewish thought. But the delegates did not rise to the occasion. The incident closed with Wasserman's withdrawal of the resolution."¹¹

Many of the more radical rabbis of those days in blissful ignorance believed that the Messianic era was fast approaching in view of the impressive progress made by Western civilization in science and letters, in industry and politics. Was it not said by some ancient Jewish teachers "that the ceremonies will be abrogated in the time to come?"¹² And very few doubted that they were on the threshold of the time to come. This eschatological belief coupled with a conscious but an unavowed desire to merge their identity in a Christian society, marred their understanding of Jewish law, and made them indifferent to the perpetuation of Judaism in an alien world. With these sentiments and feelings, it would have been a miracle if they could have appreciated the *Shulhan Aruk*.

Orthodoxy which is represented by groups of different shades of opinion, has as far as I am aware, formulated no clear and unambiguous point of view. Nominally it stands firm for the

¹⁰ *Loc. cit.*, p. 166, cf. Boaz Cohen, "Nehemiah Brüll" in *Studies in Jewish Bibliography in Memory of Freidus*, New York, 1929, pp. 218-246.

¹¹ D. Philipson, *Reform Movement in Judaism*, p. 324.

¹² Niddah 61b. On the attitude of Reform cf. Schechter's article on Geiger in his *Studies in Judaism*, 3rd Series, especially, pp. 71-83.

observance of the *Shulḥan Aruk* as interpreted by the authoritative commentators. Yet there are neo-Orthodox rabbis introducing innovations such as preaching in English, conducting late Friday evening services, pursuing secular studies, and making other concessions to popular demands; whereas the majority of the laity affiliated with orthodox congregations are as lax in observance as the non-orthodox. The thoughtful but inarticulate rabbis of the orthodox school appreciate that life is playing havoc with traditional practices but recoil from uttering any formula to remedy the situation.

A third group whose origin is coeval with the founding of the Seminary, has made extraordinary gains in the half century of its existence. It espouses what is commonly known as Conservative Judaism. The exponents of this group have often been charged, I believe unfairly, with being remiss in enunciating their standpoint. In the popular mind Conservative Judaism represents vaguely the middle road between Orthodoxy and Reform. The Reformers believe that it is a mild case of Reform Judaism which will become aggravated in the course of time. Thus Philipson wrote as follows: "Perhaps the most striking feature in the changing panorama of Jewish religious endeavor, notably in the United States, is the coming of what is now called Conservative Judaism upon the scene. Although its spokesmen are unsympathetic with and even opposed to Reform Judaism, as is evidenced by their occasional public utterances, still paradoxical as it may sound, this neo-conservatism is intimately related to the reform or liberal movement. The same causes that led to the arising of the Reform movement, *caeteris paribus*, have also brought forth this latest departure from the Orthodox Judaism of rabbinical tradition. It is largely a question of more or less."¹³

I beg to differ with Philipson's statement that the disagreement between Reform and Conservative Judaism is a question of more or less. I wish to quote from the constitution adopted by the Seminary at its reorganization in 1902 where it was affirmed in limpid language that the Seminary is dedicated "to

¹³ Preface to *Reform Movement in Judaism*, cf. also pp. 380-381.

the preservation in America of the knowledge and practice of historical Judaism as ordained in the law of Moses and expounded by the prophets and sages of Israel in Biblical and Talmudic writings." I infer from this statement that historical Judaism sponsors the principle that Scripture and the Talmud are final authorities in all matters pertaining to belief and observance.

This view is based upon the historical fact that since the Geonic period the Jews had accepted the Talmud as unquestioned authority as was explicitly stated by Maimonides, Solomon Luria and Elijah of Vilna, and was tacitly assumed by all the legal writers. The purpose of the various codes was utilitarian and not authoritarian, namely: (1) The systematization of the huge body of rules in order to facilitate the finding of the law. (2) The determination of the law in case of conflicting opinions. (3) The incorporation of new decisions and customs that accumulated in the course of time. Consequently in accordance with this historical conception, the *Shulḥan Aruk* has no more claim to our unquestioned obedience than the *Mishneh Torah* or the *Semag* or the *Tur*, yet we should accept the *Shulḥan Aruk* as a guide for religious practice which was all that Caro intended it to be, for the following reasons:

(1) The *Shulḥan Aruk* is in the main, a restatement of Talmudic Law both in form and in spirit, with many elaborations. To reject the *Shulḥan Aruk* outright would be tantamount to repudiating the Talmud.

(2) The traditional Jewish way of living as we know it, has been largely molded after the pattern of the *Shulḥan Aruk* since it has been accepted by the majority of the Jews as an ultimate authority in Jewish ritual since the seventeenth century. All legal writers in their decisions, have ever since recognized its validity or reckoned with its authority.^{13a}

(3) The *Shulḥan Aruk*, by virtue of the numerous commentaries and annotations made upon it in connection with practical

^{13a} For the method of deciding law from the *Shulḥan Aruk* when conflicting opinions are given, see for example Malachi Cohen, *יד מלאכי*, ed. Berlin, 1866, pp. 134–136.

questions, is more amenable to adjustment to present conditions than even the Mishnah, the *Mishneh Torah* or the Mordecai.

(4) The continuity of Jewish law can best be preserved by referring to the *Shulḥan Aruk*, as it is with the exception of the *Lebush*, the last attempt at codification, and therefore represents the latest phase in the development of Jewish law.

(5) Finally, since the *Shulḥan Aruk* is the most conveniently arranged and the most comprehensive code of Jewish practice extant, the task of finding the law is greatly facilitated.

But can the *Shulḥan Aruk* guide us today in an industrial and sophisticated environment which is so far away in temper and spirit from the era of its author? As a matter of fact serious doubts arose at the very beginning about the feasibility of adopting the *Shulḥan Aruk* as a norm for Jewish life when it appeared. Thus R. Moses Isserles pointed to the grave omission of the Franco-German customs. This defect he himself remedied by his annotations which became an integral part of the *Shulḥan Aruk*.

It is my deepest conviction that traditional Jewish law as codified in the *Shulḥan Aruk* can be best brought into harmony with contemporary conditions by interpretation, and not by innovation or abrogation. Sohm, a celebrated authority on Roman jurisprudence, writing of the natural conservatism of the ancient Roman lawyers has this to say: "For throughout the long period of one thousand years, extending down to the final stage in the development of Roman law — i. e., down to the *Corpus juris civilis* of Justinian — the legal force of the Twelve Tables, as the source of all Roman law, was regarded all along as remaining in theory unimpaired, in spite of the fact that when the end came, there was not a stone in the entire structure of the decemviral laws but had long been displaced from its original position. And this was quite in keeping with the conservatism of the Romans and the extreme caution with which they proceeded in all matters of law. Not one letter of the Twelve Tables was to be altered, yet the new spirit was to be infused into the old letter. The decemviral legislation being complete, the time had arrived for an 'interpretatio' which should develop and even alter the

law, but should at the same time leave the letter of the law intact."¹⁴

Similarly the long chain of expounders of Jewish law throughout the trials and tribulations of Jewish history, never declared a Biblical or Talmudical law null and void, but adapted rules that became archaic or obsolete to the changing conditions of the epoch by the time-honored method of interpretation. Neither is the need for interpretation in itself any reproach to the law for no general rule can be so framed as to anticipate every variety of human event. "Indeed law without interpretation," says Pollock, "is like a skeleton without life and interpretation makes it a living thing."

There can be no valid objection to continuing this process if we understand aright the nature and scope of interpretation. In its simplest terms, it signifies the determination of the meaning of the text of the law when it is obscure or ambiguous or the endeavor to define the scope of the rule when its formulation is equivocal. Interpretation in this sense is chiefly found in the commentaries on the Talmud.

Interpretation in the wider sense denotes the process of applying the law to a particular case. This involves three operations: (1) The finding of the law which sometimes is the result of a choice among competing rules or analogies. (2) The determination of the scope and meaning of the rule when discovered. (3) Application of the rule to the given situation. This type of interpretation can be most profitably studied in the responsa literature.

In very deed an exposition of the method and principles of interpretation of the mediaeval rabbis will reveal how they came to terms with the world of events of their time and how Judaism was made effective and vital by their efforts.

The burden of interpretation today is more onerous than ever before, for the historical view makes us all too keenly aware of development in the law, whereas in the past the changes were made unconsciously. Secondly, a modern philological approach forbids us from reading into the law that which was not impossible for our predecessors.

To solve the problem that besets us we require a creative

interpretation of the law, in opposition to the mere mechanical process of applying the law. Creative interpretation can only issue from studying the methods applied by earlier generations combined with experience and knowledge gained by continuous and open minded observation of life united with circumspection to exercise proper judicial discretion. The chief obstacles to such an interpretation would be the failure to comprehend the force and operation of the law, a bleak worship of its letter, an exclusive reverence for precedent, and cold logical ratiocination, for logic merely helps us to comply with the technicalities of the law, whereas a certain elasticity is required if we mean to attain the ends for which the law exists.

Now aphorisms and maxims galore may be culled from the Talmud which express the motives and principles that guided the rabbis in their interpretation of the law. These are statements of general policy and represent tendencies in legal thinking capable of general application. They are useful as far as they go, if we can envisage the situation to which they referred, but we may be misguided if we attempted to apply them literally and indiscriminately to the delicate and intricate problems of today.

II

What are the ideas and principles, the experiences and feelings, the spirit and the attitude that sway us, knowingly or unknowingly, when we render decisions or opinions on questions of law?

1. *The Historical View of the Law*

We conceive of Jewish law as a body of practices and regulations that have undergone a long development since the time of Moses, but in their essence and spirit have remained unchanged. The precepts of Scripture and Talmud are uniquely distinguished in that they alone command unquestioning loyalty and obedience from the Jew. No code subsequent to them has the same sanction, but is valid insofar as it historically and authentically interprets Biblical-Talmudic legislation. When we are

asked what is the Jewish law on this or that point we do not answer fully by referring to this or that code, commentary or responsum, for no single code is the complete expression of the law. The origin,^{14a} the transformations of the rule, its archaic features, discarded elements, temporary expedients,¹⁵ idealistic aspirations^{15a} as well as its present interpretation are all part of the majestic structure.

2. *The Shulhan Aruk is a Valid Guide*

As an inevitable corollary to our first principle follows the view that the *Shulhan Aruk* is a valid guide to Jewish practice but is neither infallible, nor final. Consequently, it is not inconsistent in special cases to appeal from the *Shulhan Aruk* to the Talmud or to other legal authorities when the situation warrants it, to review past decisions and interpretations pre-

¹⁴ *Institutes of Roman Law*, Oxford, 1926, 2nd edition, pp. 55-56.

^{14a} Gaius remarks that a man who comes to the task of interpretation without knowing the origins and the beginnings is like a man who comes to dinner with unwashed hands. Cf. *Digest* I.2.1, and Schulz, *Roman Legal Science*, p. 187, note 3.

¹⁵ For example when the Jewish people were being decimated by dire persecution, the authorities sought morally and legally to encourage the growth of population. Thus Maimonides writes, "He who increases the Jewish population by one person, is considered as if he built the world" (*Ishut* XV. 15). שכל המוסיף נפש אחת בישראל כאלו בנה עולם. R. Asher (*Yebamot* VI.15) and R. Joseph ibn Habib laid down the rule that if a man was not married before he reached the age of twenty, the Bet Din could compel him to do so (for the age limit of 20, cf. *Kiddushin* 29b and *Ishut* XV.2). This rule was incorporated in the *Tur* and *Shulhan Aruk Eben ha-'Ezer* I.3. At a subsequent period it was found highly impracticable to enforce this emergency measure and we find R. Solomon Luria writing that it was best not to attempt to carry out this rule. There were many bachelors in his time who neither devoted themselves to the study of the Torah, nor led a sinless life, he tells us, yet inasmuch as they found it difficult to earn a livelihood due to the hard times, and large dowries were expected of them, marriage could not be forced upon them, ים של שלמה to *Yebamot* VII.40. R. Moses Isserles incorporated Luria's opinion in his glosses to the *Shulhan Aruk*, cf. also Ihering, *Law as a Means to an End*. New York, 1924, p. 340.

^{15a} Cf. Pound, "The Ideal Elements in American Juridical Decision," *Harvard Law Review*, 45 (1931), 136.

supposed by the *Shulḥan Aruk*. I should like to illustrate by citing the law concerning the *Ger*. In the procedure for the admission of proselytes as prescribed in the *Shulḥan Aruk*,¹⁶ there is a rule that is incompatible with the modern concept of צניעות,^{16a} namely, the one requiring the female neophyte to undergo *Tebilah* in the presence of three men. While the regulation can be traced to the *Mishneh Torah*,¹⁷ it is not required by the Talmud. According to a Baraita in Yebamot 47b, two learned men were present at the immersion of a male proselyte עומדים על גביו, but this requirement was waived for reasons of delicacy in the case of a *Giyuret* as is clear from the words "they stood outside" עומדים לה מבחוץ. Apparently Maimonides¹⁸ interpreted the phrase עומדים לה מבחוץ as referring to the time when the female prospective proselyte entered into the water, but he assumed that the Talmud required the דיינים to be present at the *Tebilah*, since the Baraita makes the statement אשה נשים מושיבות אותה במים only with respect to females, but the Beth Din was to leave before she got out of the water. The view of the Talmud that the Beth Din was not required to witness the *Tebilah* in case of female proselytes is presupposed by the *Halakot Gedolot*¹⁹

¹⁶ *Yoreh Deah* 268.2.

^{16a} For the concept of צניעות cf. Megillah 10a, Maimonides, *Hilkot De'ot* V.6, *Orah Hayyim*, 240 and Epstein, *Sex Laws and Customs in Judaism*, New York, 1948, pp. 25–67.

¹⁷ Maimonides *Issure Biah*, XIV.6, ואם היחה אשה נשים מושיבות אותה במים עד, צוארה והדיינים מבחוץ ומודיעין אותה מקצת מצות קלות וחמורות והיא יושבת במים ואחר כך טובלת בפניהם והן מחזירין פניהן ויוצאין כדי שלא יראו אותה כשחעלה מן המים. The Meiri to Yebamot 47b (ed. Albeck, pp. 189 and 197) and R. Moses of Coucy, *Semag*, negative precepts, 116 (ed. Kopy, 25d) follow Maimonides. Aaron ha-Kohen Peraḥya (a Salonica rabbi of the 17th century) in שו"ת פרח מטה אהרן, Amsterdam, 1707, vol. II insists that even בדיעבד if the *Tebilah* for a female proselyte did not take place in the presence of a Bet Din, the ceremony must be repeated.

¹⁸ R. Jacob Ettlinger in his ערוך לנר to Yebamot 48b observed as follows: והרמב"ם הוסיף בזה שנכנסים ורואים טבילה ואחר כך יוצאים וג' ל' שיצא לו כן מה דקתני דמושיבין אותה במים עד צוארה ולמה לי כן אלא ודאי מפני שצריכין הדיינים לראות טבילה. However, R. Joseph Rosen in his צפנת פענח to *Issure Biah* XIV.5 remarks ולכך דייק בגמ' רק גבי אשה שמושיבין אותה במים עד צוארה ולא גבי איש דהא ק"ל לכו רואה את הערה אסור.

¹⁹ Ed. Warsaw, p. 49a, ed. Hildesheimer, pp. 108–109. Furthermore it is stated in the *Halakot Gedolot* that when a Gentile female slave goes to the

and Alfasi that repeat the Talmudic law verbatim with no comments. Whereas the French scholars^{19a} are even more explicit and consider it improper for men to witness the *Tebilah*.

3. *The Sources of the Shulḥan Aruk*

We distinguish between the sources of the *Shulḥan Aruk*, the Biblical legislation, the Talmudic interpretations, and the post-Talmudic elaborations giving due weight to each phase in the development of the law. This was done in each instance by Caro in his epoch-making commentary on the *Tur* as well as all the great halakists. In this work, Caro exhibits an insight and historical understanding that was uncommon in his time. I shall illustrate this point from a decision given by R. Isaac ben

Mikvah, she is accompanied by a woman. ומסתא אחיא איתחא ועיילה בהדה לבי טבילה.

^{19a} The French scholars seemed to be influenced by an ancient and perhaps Geonic tradition preserved in מסכת גרים I.4, (ed. Higger, p. 69) where the text reads האיש מטביל את האיש והאשה מטבילה את האשה. R. Jacob Naumburg in his commentary יעקב נחלח *ad loc.* explains the passage as follows. לא אחי לאשמעין אלא באיש צריך לטבול בפני אנשים ואשה בפני נשים והתלמיד חכמים עומדים מבחוץ בטבילה אשה. Tosafot (Yebamot 45b s. v. טי) make it quite clear that a Bet Din of three is only required for קבלת המצות and as far as טבילה is concerned, it is necessary only לכתחילה, and in case of a woman, the תלמיד חכמים stand outside at the time of *Tebilah*. This is what they say אין דרך נשים להביא איש עמה בשעת טבילה. ויש לומר הא דבעינן שלשה היינו לקבלת המצות אבל לא לטבילה אע"ג דאמרין לקמן דשני תלמידי חכמים עומדים מבחוץ היינו לכתחילה דעדיף טפי ויש מפרשים דכיון דידוע לכל שטבילה כאילו עומדים שם דמי הברדין והבוצרין כיון שהכניסו לרשות, Professor Saul Lieberman called my attention to Mishnah, Tohorot, X.3, (This passage is cited in Y. Hagigah III.4). The Mordecai (Yebamot 36) also accepted the view that טבילה מיוחדת לה שלשה תלמידי חכמים לכתחילה, whereas R. Judah b. R. Yom Tob explained that Biblically the presence of only one at *Tebilah* would be sufficient but that the rabbis required three. R. Simḥah too was of this opinion. The Mordecai then continues: ולבריו אי אפשר דלא הוה חד בשעת טבילה וק"ק דחמא הוא וכי אנשים רגילים לילך במקום שנשים טובלות אם לא לצורך גירות ואשה אין נראה דכשרה. The view of the Mordecai is partly cited by R. Joel Sirkes to *Yoreh De'ah* 268. It is noteworthy that the view of the Tosafot is accepted by R. Asher, Yebamot IV.31 and R. Jacob ben Asher, *Tur*, *Yoreh De'ah* 268 and R. Yeroham אדם וחיה IV.23, ed. Kopy, 58 a-b, and is cited by the *Bet Joseph* to *Tur* 268.

Sheshet²⁰ with reference to a man who had no children and wished to marry a very wealthy woman from Valencia who was over ninety years of age. When the community issued an injunction against the marriage he appealed to the Cadi (אדון העיר) to set it aside on the ground that neither the law of God nor the rule of the Torah prohibited it. The Ribash replied that there was a Talmudic law against it לפי הגמרא כל זה שורח הדין but for many generations previous no Court ever enforced this rule, nor the rule requiring a couple who were married for ten years without offspring to divorce, nor did it prevent marriage between the daughter of a Kohen or of a scholar and an ignoramus. For a strict enforcement of these rules would have wrought havoc with Jewish family life, he tells us, hence the Courts only compelled obedience to the rules pertaining to consanguinity, (משום ערוה ומשום אסור קרובה). Here we see clearly the Ribash like the other legalists acquiescing in distinctions in Talmudic law made by public sentiment which he would not have recognized if it referred to Biblical law.

4. Laws, Customs and Superstitions

It is necessary to distinguish between law, (הלכה), customs, (מנהג)^{20a} and superstition²¹ in interpretation. The validity of a custom which is ancient, and has been continuously observed, is interwoven with the texture of the law and is not repugnant to any fundamental principle of law or ethics, should be recog-

²⁰ Responsa no. 15.

^{20a} Cf. Isserles to *Orah Hayyim* 690.17 and *Be'er Heteb*, note 15.

²¹ Cf. D. Joel, *Der Aberglaube und die Stellung des Judenthums zu demselben* I-II, Breslau, 1881-83; J. Finkelscherer, *Mose Maimunis Stellung zum Aberglauben und zur Mystik*, Breslau, 1894; J. Trachtenberg, *Jewish Magic and Superstition*, New York, 1939. Some times the term מנהג שטות denotes superstition. The Kapparot ceremony is characterized as מנהג שטות in the first edition of the *Shulḥan Aruk*, but the term was changed in the subsequent editions, cf. *Jewish Encyclopedia*, VII, 435-436 and Ginzberg, גנוי שעכטער, II, 122-123. The term מנהג שטות also designates foolish custom, cf. Tosafot, Berakot 48b s. v. מתחיל.

nized. It would be most imprudent for example, to deviate from the practice of covering the head during religious services, or during the performance of religious acts, although this practice is merely a custom, for the observance of this custom has become the outward symbol of loyalty to traditional Judaism.²²

To illustrate when it is allowable to differentiate between Halakah and Minhag, I cite the following: "Thus it would be highly improper to solemnize a marriage during Ḥol-ha-Moed since it is expressly proscribed in the Mishnah,²³ whereas under special circumstances it may be permissible during Sefirah²⁴ or on Purim,²⁵ since it is a post-Talmudic prohibition. In general we are inclined to be more lenient with regard to customs than with strict law."^{25a}

Many quaint customs²⁶ and superstitions have arisen in con-

²² Cf. Nedarim 30b, T. 'Erubin XI.16, p. 153, as well as the passages in *Jewish Encyclopedia*, s. v. "Bareheadedness," ארצות החיים, 1860, p. 14, and Goldziher, "Die Entblössung des Hauptes," *Der Islam* VI.301-316, Lauterbach in the *Yearbook* of the C. C. A. R., Vol. 38, 1928, Medini שדי חסד, Warsaw, 1896 s. v. ביח הכנסת, pp. 159-160, Kasher in *Horeb* IV, pp. 195-206, Lieberman, *J. Q. R. N. S.* 35:7, note 44, Rivkind, in *Ginzberg Jubilee Volume*, Hebrew Section, pp. 401-423 and Krauss *H. U. C. A.* 1945-1946, pp. 121-168. On covering the head among the Romans, cf. Mommsen, *Römisches Staatsrecht* III, part 1, Leipzig, 1887, p. 217 notes 4-5. Marquardt, *Privatleben der Römer*, 2nd ed., pp. 571-572, Blümner, *Die Römischen Privataltertümer*, Munich, 1911, p. 228 and Hermann-Blümner, *Griechische Privataltertümer*, 1882, pp. 179-180.

²³ Mo'ed Kattan I.7.

²⁴ The custom not to marry during the *Sefirah* can be traced only to Geonic times, cf. שערי תשובה, no. 278, and Ibn Ghayyat, *Hilkot Pesahim*, Berlin, 1864, p. 51, and *Bet Joseph* to *Orah Hayyim*, 493, cf. also *Jewish Encyclopedia* IX, pp. 399-400 and I. Levi, in *Melusine* VIII, pp. 93-94.

²⁵ This prohibition originated in post-Geonic times, cf. the full citation of authorities in משה דרכי to *Tur*, *Orah Hayyim* 696.

^{25a} For the differentiation between law and custom, cf. the statements אמניא אמן אמן מנהג ואם אסורא ואם אסורא (Yebamot 13b) and (Y. Shebi'it V.1).

²⁶ The custom for example of not using the shoes of the deceased goes back to the *Sefer Hasidim*, ed. Wistinetzki, p. 379, no. 1544, cf. Ehrenreich, *Otsar ha-Hayyim* VI, 96-97, 121-122. For the zealous observance of the laws of mourning, cf. Frankel, דרכי המשנה, Leipzig, 1859, p. 13, note 5. Cf. also Nacht, "Symbolism of the shoe," *J. Q. R., N. S.*, VI, 1915, p. 14, and Levy,

nection with the last rites for the dead and the observance of mourning for the deceased. Although sixty exhaustive chapters in the *Yoreh De'ah* are devoted to this topic Caro failed to meet the ravenous demand for more rules. In addition to the Kad-dish,^{26a} the custom of visiting the graves of departed relatives²⁷

"Die Schuhsymbolik," *M. G. W. J.*, 62, 1918, pp. 178–185. Many customs in the *Shulḥan Aruk* can be traced to the Zohar, cf. *Be'er Heteḇ*, *passim*, Reifmann in *Bet Talmud* II, 1882, p. 87 and *Jewish Encyclopedia*, IV, 519.

^{26a} The legal authorities wrote טוב למעט בקרישים *Orah Ḥayyim* 55.1, *Be'er Heteḇ*, note 1.

²⁷ The custom of visiting the graves is mentioned already in Ta'anit 16a with reference to public fast days. In the days of the Tosafot it was customary to do so on the ninth of Ab, and since the time of Jacob ben Moses Möllen, also on the day before the New Year, and the day before Yom Kippur (Maharil, ed. Warsaw 1874, p. 33b, and דרכי משה to *Tur*, *Orah Ḥayyim* 581) and Grünwald, *Kol Bo*, pp. 166–168. In connection with this practice it became customary to give charity while visiting the grave; (*Kol Bo*, quoted by Isserles to *Orah Ḥayyim* 581 and *Shelah*, ed. Lemberg, 1860, p. 144a), cf. also I. Levi, *R. E. J.* 47 (1903), 214–220; not to visit the same grave twice in one day. (View of Isaac Luria quoted by *Be'er Heteḇ* to *Orah Ḥayyim*, *loc. cit.*); to visit graves of Gentiles provided there were no idolatrous images, in the absence of Jewish cemeteries; (*Be'er Heteḇ*, *loc. cit.* 559), not to visit the cemetery in a state of impurity since one was susceptible to attack by the demons (View of Isaac Luria quoted by the *Be'er Heteḇ*, *loc. cit.*), not to walk on the graves proper, but to keep at a safe distance of four cubits, lest one be exposed to the evil spirits, (Danzig, חיי אדם, 135.25). R. Elijah of Lublin was pondering over the question whether it was necessary in a town which had two cemeteries, to visit both (יר אליהו, Amsterdam, 1712, no. 31). In the Talmud two reasons are given for the custom (1) that the dead interceded in behalf of the living, (2) that the atmosphere of the graveyard put the worshipper in a proper mood for praying. Cf. Berakot 5a יזכור לו יום המיתה. The first reason seems to be the oldest. Thus the primitives, would go to the grave, pour water over it, and pray for rain when the land suffered from unseasonable drought (Frazer, *Golden Bough* 1, 286). Caleb prayed upon the graves of the patriarchs, Sotah 34b, *Sefer Ḥasidim*, ed. Wistinetzki, p. 377, no. 1537; in the Middle Ages the question was discussed whether a Kohen was permitted to visit the graves of the righteous, cf. Israel of Shklov, *Peat ha-Shulḥan*, Jerusalem, 1911, I, p. 11b and Toledano, ים הודול, Cairo, 1932, no. 65. For the custom of throwing grass or pebbles on the tombstone when visiting cemeteries, cf. *Be'er Heteḇ* to *Orah Ḥayyim* 224.11. An edition of *Tehinot* to be read while visiting graves on the eve of Rosh Hashanah and the eve of Yom Kippur was published in Salonika, 1651, cf. Yaari, *Kiryat Sefer* XVI, 381. Cf. also Moses Math מטה מטה, no. 839; Simon Levy, "La Visite aux Morts" in *Les Loisirs d'un rabbin*,

and the ceremony of unveiling²⁸ have been raised to the dignity of a positive Biblical precept. This unhealthy over-emphasis upon, and the mechanical observance of, the rules of mourning, is not due so much to the sentiment of piety as to the feeling of fear and helplessness in the presence of an awful, baffling and discomfiting experience. It betokens that religion is not in a robust state of health, when people claim its comfort and ministrations only in the time of bereavement but otherwise they need not its sanctions.

Our sages tell us "that we should follow the most lenient views with regard to the laws of mourning הלכה כדברי המקיל" but I suppose that a proper reverence for the feelings of the bereaved require a tactful rather than a strictly halakic approach to the problem. We should combat however, the importation of non-Jewish customs into the last rites.

5. *The Nature of the Laws*

It is useful to bear in mind the distinction between religious and civil law³⁰ ממונה and איסורא, the latter being in abeyance now in most countries.³¹ The religious law may be further classified

Paris, 1892, pp. 129 ff. and Trachtenberg, *Jewish Magic and Superstition*, New York, 1939, pp. 64-65.

²⁸ The elaborate ceremony in connection with the unveiling of a tombstone is of recent origin, cf. I. L. Leucht, *Order of Services . . . at the setting of Tombstones*, New Orleans, 1880, Mordecai Winkler, לבושי מרדכי, 2nd Series, Miskolcz, 1937, *Yoreh De'ah*, 140, and Landshuth, סדר בקור חולים, Berlin, 1867, German part, p. 5.

²⁹ 'Erubin 46a and parallels.

³⁰ For the profound influence of religion upon civil law, cf. Fustel de Coulanges, *The Ancient City*, New York, 1916, pp. 49 ff.

³¹ Cf. the commentaries to *Hoshen ha-Mishpat*, 26. Until recent times it was deemed highly improper to go to Gentile courts for civil actions. Thus one who was guilty of such an offense was considered unfit to act as a Hazzan on the New Year or Day of Atonement (Aaron Sason, תורת אמת, no. 157, quoted by the *Be'er Heteib* to *Orah Hayyim*, 53-25). For the mediaeval ordinances on this subject, cf. Finkelstein, *Jewish Self Government in the Middle Ages*, pp. 42, 43, 156.

as liturgy, ceremonies and family law.³² It is a fact that the post-Talmudic authorities took more liberty with the liturgy than with the ceremonies. This accounts for the endless diversities of rites that have appeared in the various countries described in a masterly way by Leopold Zunz.

In passing, I wish to touch upon the problem of changing the liturgy which is still being debated. There are two matters to be considered. (1) The prolixity in the prayers. (2) The allusions in the ritual to doctrines such as the restoration of the sacrificial cult,³³ the resurrection,³⁴ or the election of Israel.³⁵

There can be no halakic objection to the omission of certain prayers from the service in order to shorten it when the occasion requires it,^{35a} but it would be dangerous and wanton to tamper

³² The nearest equivalent to the term "family law" is found in Shabbat 130a where it is stated that Israel complained bitterly over the restrictions in Jewish law concerning the family, עַל עֲסָקֵי מִשְׁפּוּחוֹתָיו.

³³ The practice to commemorate the destruction of the temple by midnight prayers reaches back to Geonic times (cf. Lewin, *Otsar ha-Geonim*, Berakot, p. 3) and was especially recommended by R. Asher (Berakot I.3). This custom was rooted deeply in the strong feeling over the loss of the national shrine. In later times due to mystic influence, many uninspiring meditations were introduced known as חִקּוֹן חֲצוֹת, and special societies were organized to recite them, cf. *Jewish Encyclopedia*, IV.550, and Elbogen, *Der jüdische Gottesdienst*, Berlin, 1924, pp. 387, 389.

³⁴ Maimonides interpreted the doctrine of resurrection of the body which he realized was so deeply rooted in rabbinic thought (cf. Löwinger, "Die Auferstehung in der jüdischen Tradition," in *Jahrbuch für jüdische Volkskunde*, ed. Grünwald, Berlin, 1923, pp. 23-122), to refer to the Messianic era, (cf. his "Treatise on Resurrection," ed. Joshua Finkel in the *Proceedings of the American Academy for Jewish Research*, Vol. IX, New York, 1939) but in the world to come the soul will survive everlastingly only in a disembodied form, (*Hilkot Teshubah* VIII.2). The later rabbis discussed the question whether a woman who died and was resurrected miraculously was allowed to remarry during the lifetime of her husband, cf. *Be'er Heteb* and פְּתַח חֲשׁוּבָה to *Eben ha-'Ezer* 17.1.

³⁵ The doctrine of election is by no means antiquated and as Professor H. Wheeler Robinson well says, "it is the mandate to a minority to persist in their purpose as being the purpose of God. The particularism it involves belongs to every high mission, and is no mark of provincialism in religion," *Record and Revelation*, Oxford, 1938, p. 327. Cf. also Helfgott, *The Doctrine of Election in Tannaitic Literature*, New York, 1954.

^{35a} For the rules concerning one who came late to the services, cf. *Orak*

with the texts of the prayer with the avowed purpose of bringing them into unison with our present temper. First, we could never reach a general agreement on dismemberment. Secondly, the prayers, based mostly on Scripture are part of the historical consciousness of Israel, which we dare not lightly disregard. Lastly in Judaism, prayer is more an expression of the emotions and aspirations, and longing for the Infinite, rather than a profession of philosophy. The significance of prayer lies in the depth and the nobility of feeling it can arouse in us, rather than in the intellectual assent it can command. I seriously doubt whether tinkering with the liturgy in itself can bring about this end.

It is interesting to recall the attitude of the halakists anent this question. When Mar Zutra visited R. Ashi while he was in mourning, the Talmud tells us, he inserted in grace after meals the following sentence: "The Good One, Bestower of Good, the True God and Judge, and Righteous Arbiter, takes man away in justice" *הטוב ומטיב אל אמת דיין אמת שופט צדק ולוקח במשפט*.³⁶ The *Halakot Gedolot* and Alfasi omit the phrase "takes man away in justice" *במשפט ולוקח* because it implies that man's mortality is part of Divine justice which contradicts the accepted doctrine "that death comes also to the sinless and suffering to the innocent" *יש מיטה בלא חטא ויש יסורין בלא עון*. Tosafot and R. Asher object to the innovation and insist upon the retention of Mar Zutra's statement *מיהו בכך אין למחקק*.

There are rules in the *Shulhan Aruk* which today belong to the domain of hygiene.³⁷ At one time they were considered part

Hayyim, 52. An abridged form of grace was composed by R. Naphtali, cf. *Be'er Heteib to Oraḥ Hayyim*, 192, 1. R. Naphtali Katz wrote an approbation to the Prayer book *שער השמים*, Amsterdam, 1717, which contains the commentary of R. Isaiah Horowitz.

³⁶ Berakot 46b.

³⁷ M. S. Bamberger, "Die Hygiene des Shulhan Aruk," in Max Grünwald, *Die Hygiene der Juden*, Dresden, 1911, pp. 231-243. cf. also Tosafot, Mo'ed Katan 11a, s. v. *כוורא* and Tosafot, Bekorot 44b, s. v. *אל ישתין*. For halakic rules inconsistent with science, cf. Maimonides, *Hilkot Sheḥitah*, X.12-13, Responsa of R. Isaac ben Sheshet, no. 447, and J. Carlebach, *Jeschurun*, I (1914), pp. 55-60.

of religion. Thus when R. Huna reproached his son Rabbah for failing to attend the brilliant lectures of R. Ḥisda, his son replied that the lectures dealt not with religion but with worldly affairs such as sanitation and hygiene. His father quickly rejoined "He lectures upon the vital problems of health and you term them mundane matters. That is all the more reason you should attend."³⁸ These regulations, insofar as they are incompatible with current medical science, may be discarded.

6. *The Need for Perspective*

In evaluating the various rules and customs it is imperative to maintain a sense of proportion. According to the traditional conception, all the laws are equally of divine origin and all must be equally observed, *והוי זהיר במצוה קלה כבחמורה*. Yet the rabbis divided the precepts into lighter and weightier commands *מצוות קלות וחמורות*, indicating that some are relatively more important than others, in so far as their infraction entailed more serious consequences. The severity of punishment attending the violation of the law determined the relative gravity of the command.³⁹ The ease or difficulty with which the law could be perfected was occasionally taken as a standard for comparison. The ceremony of Sukkah⁴⁰ and the duty of sending the mother

³⁸ Shabbat 82a, Hence Maimonides included rules of hygiene in his *Hilkot De'ot*, III-V, 6. In chaps. III.3, IV.1 he writes: That it is one's duty to take care of his health, for unless one is well, one cannot acquire learning (*שיבין*) (וישכל בחכמות) or worship God. Neither can one understand or have knowledge of the creator when one is sick, hence it is an obligation to be sound and robust in body, *והואיל והיות הגוף בריא ושלם מדרכי השם הוא שהרי אי אפשר שיבין או ידע דבר מידעת הבורא והוא חולה*.

³⁹ 'Erubin 21a, Yoma 85b, Shevuot 39a. Although the punishment for homicide was not as severe as that for other sins, yet Maimonides considered it by far the greatest crime, (*Rotseah* IV.9), whereas he instances the rule about *שעטנו* and cutting around the corners of the head as examples of light sins (*Teshubah* III.9), see also Sanhedrin 74b. For the eight grievous sins, cf. Ginzberg, *Legends of the Jews*, VI.364, cf. also M. Steckelmacher, "Etwas über die leichten und schweren Gebote in der Halachischen Agada" in *Festschrift A. Schwarz*, pp. 259-268. Cf. also Tosafot Abodah Zarah 13a, s. v. *ללמוד*.

⁴⁰ Abodah Zarah 3a.

bird away when the fledglings are taken,⁴¹ were considered as light commands מצוות קלות. From various sources we learn that our forebears sacrificed their lives rather than desecrate the Sabbath, the dietary laws and circumcision.⁴² This speaks volumes for the high regard they attached to these ceremonies. Observe that before the proselyte was admitted to the Jewish fold he was to be instructed according to the Talmud,⁴³ in the weighty commands מצוות חמורות such as the Sabbath and the dietary laws,⁴⁴ and the lighter commands מצוות קלות such as the poor laws ופאה, שכחה, לקט. The statement that the ceremony of ציצית is equal to all the ceremonies,⁴⁵ is perhaps an effort to strengthen a generally neglected law.

The verse "thou shalt not seethe a kid in its mother's milk" thrice repeated in the Torah, inspired the later casuists to extensive elaborations and subtleties collected in the section on meat and milk בשר וחלב. A true perspective, not an easy attainment, is necessary if we are going to realize the relative significance of all these details. There are other judgments and adjustments that must be made on the basis of an extra-legal approach, such as feeling and intuition. Thus keeping one's business open on the Sabbath^{45a} and carrying a hand-

⁴¹ Mishnah, Hullin, end, and Y. Kiddushin 61b, cf. also Ta'anit 11a. The command given to Adam was considered easy, whereas Joseph is commended for having refrained from yielding to the temptation of committing a most serious offense, Genesis Rabbah 87.5 (ed. Theodor Albeck, pp. 1066-7), and Sifre, Numbers 115, ed. Horowitz, p. 128.

⁴² Cf., e. g., I Maccabees I.41-53, and Greenstone in *Jewish Encyclopedia*, s. v. "Martyrdom."

⁴³ Yebamot 46b.

⁴⁴ Cf. also Tosefta, Ketubot IV.11.

⁴⁵ Cf. Nedarim 25a. The same remark is made about other precepts, e. g., for the Sabbath, cf. Tanhuma, Ki Tissa 33, and for circumcision, cf. Nedarim 32a. In Menahot 44a, the law of fringes is considered a light precept. Cf. Rashi to Sanhedrin 110b, s. v. מצוה and Strack and Billerbeck, *Commentary on Matthew*, I.900-905.

^{45a} The rabbis do not include buying and selling in the thirty-nine prohibited works but Philo says that Moses ordained "abstaining from work and profit-making crafts and professions and business to get a livelihood," (*Moses*, II.211, ed. F. H. Colson; vol. VI.533). Abraham Danzig writes that a person is disqualified to act as a *shohet* if he desecrates the Sabbath, provided the

kerchief⁴⁶ in one's pocket, are both prohibited by the law, but the lay person would draw a distinction.

A true perspective is not purely subjective *אם כן נחת דבריו* לשעורין, but develops from an interrelated knowledge of Jewish life, from a synoptic and well-balanced view of Jewish law, from an apprehension of the essence and not merely the casual details of religion. To avoid the mistake of taking distorted images or optical illusions as true perspectives, we must know something of the various aspects of religion.

"In religion, so long as it is alive," says Julian Huxley, "four aspects are blended. There is immediate emotional experience; there is ritual expression; there is a connection with morality; and there is an intellectual scaffolding of ideas and beliefs. These can never be wholly disentangled. Even in the most personal of mystical experiences there is a setting of mind and body which is itself a ritual act; there is a background of consciously or unconsciously held beliefs which influence the form of experience; there is an experience of rightness which overflows on to abstract views of morality and conduct. Ritual again, if it be fulfilling its true mission will itself be a source of religious feeling, but a ritual which is moving and significant to a mind imbued with one set of intellectual ideas will appear meaningless against another background of belief, and a degraded mumbo-jumbo against yet another."⁴⁷

7. Importance of Public Opinion

It goes without saying that we must reckon with the sentiment of the people if we wish to decide between conflicting customs. For no system of rules can be imposed upon a group

act is Biblically prohibited, if it were a violation of a rabbinical enactment such as engaging in commercial transactions on the Sabbath, then he is not debarred, cf. *חכמת אדם*, I.8.

⁴⁶ Cf. *Orah Hayyim* 301.23 and *Pahad Yitshak*, s. v. Fazzoletto (פאצולייטן) 2b. The Yiddish word for handkerchief "fachelke" is derived from the Italian, cf. also Cecil Roth, *The Jewish Contribution to Civilization*, p. 54. Rashi in *Shabbat* 120b explains *Sudar* as handkerchief.

⁴⁷ *What Dare I Think*, New York, 1931, pp. 221-222.

that does not meet with their approval. Many statements can be cited from the Talmud and later authorities to show how keenly aware they were of this fact. Thus R. Joshua ben Levi says: "Whenever the Bet Din is in doubt as to the interpretation of a law, and you do not know how to comply with it, observe what the people do." הלכה שהיא רופפת בבית דין ואין את יודע מה יעשה. ⁴⁸ Well enough to say "observe what the people do" but what people do we mean? Shall it be the ever dwindling minority who declare: "Till heaven and earth pass, one jot or tittle shall in no wise pass from the law, till all be fulfilled," or shall we consider the large sect that is apathetic to, if not disdainful of Jewish ceremonials and say: "It is vain to serve God; and what profit is it that we have kept His charge, and that we have walked mournfully because of the Lord of Hosts?" Or should we rather not think of that group that is loyal to Judaism and would fain observe the Jewish way of life, but recoil from the mounds and mounds of rules, the חילין חילין של הלכות.

There are, for example, an increasing number of Jews who rationalize the practice of kindling electric lights on the Sabbath, especially if a *Shabbos Goy* is not available. Others who feel reluctant to disregard this time-honored prohibition, will answer a telephone. Still others will shrink from performing this act, but will press an electric button, whereas the strictly observant will abstain from ringing the bell or using a house elevator.⁴⁹ While these subtle distinctions represent a casuistry of common sense, they are lay fallacies in the law.

8. *Spirit of the Times*

The spirit of our age (*Zeitgeist*) differs greatly from that of Caro's epoch. The *Shulhan Aruk* like all Jewish codes of law, presupposes a deep spirit of piety and exhales a fragrance of religious idealism. Indeed the opening paragraph of the *Shulhan Aruk* bids the Jew to be cognizant at all times of the presence

⁴⁸ Y. Peah VII.5, cf. also Berakot 45a.

⁴⁹ For the latest responsum on this subject, cf. Toledano, ים הגדול, no. 26.

of God, and to motivate his conduct in accordance with this belief. The real *Shulḥan Aruk* Jew of by-gone times, was one who regarded every command be it ritual, legal or ethical as ordinances of Divine origin. To practice the precepts of Judaism was a joy to him no matter what the difficulties were, even at the risk of martyrdom.⁵⁰ His character was transformed by its precepts because its doctrines were sincerely held and vitally apprehended. It was natural that a passion for exacting rules חומרות existed.^{50a} There were of course, some variations from the main theme including undertones and disharmonies, but they were not impressive enough to be disturbing.

Today we are living in an essentially irreligious and irreverent age. One cannot escape the feeling that the rise of the totalitarian states demanding and getting the exclusive worship from the individual is the result of the decay of modern religion which set in long before the World War. The decline of religion brought in its train the Fall of Man in the Garden of a cunning and crafty civilization. But even the small sect that wishes to perpetuate religion puts a different assessment upon its nature and function. With John Stuart Mill, the modernist views religion as a social process originating in the complex life of man's desires and emotions directed toward ideal ends. Its purpose is to foster the growth of human personality. It is no mean task for religion to be the champion of personality in a seemingly impersonal world, for science and invention have created a type of civilization in which human personality is debased. Yet the element of piety should not be absent from a well-balanced personality, nor is it incompatible with a critical faculty. 'Tis true that so far as piety is an inward feeling and

⁵⁰ *Yoreh De'ah* 157. Cf. also Schechter's article: "Joy of the Law," in *Aspects of Rabbinic Theology*, pp. 148-169.

^{50a} Protests against an excess of חומרות were uttered by R. David ibn Zimra, cf. his Responsa I.163, and II.637. It was natural for folk who believed in the divine source of every command to observe them punctiliously and err on the side of caution. Many severities were introduced during the persecutions in Germany for which Jews blamed their sinfulness. Numerous חומרות from the twelfth century can be traced to that feeling, cf. also statement of R. Ashi in *Berakot* 51a-b.

illumination, it cannot be taught, but in so far as it is a response to religious and social ideals of one's group it can be elicited by implanting a sympathy for the ideals and aspirations of Judaism through a religious education with an idealistic motivation and approval, rather than through pure factual instruction.

It is when traditional piety⁵¹ is believed to come into conflict with the development of human character and its needs that the problem is posed. Thus according to the strict law it is interdicted not only to turn on a radio on the Sabbath but also to instruct a Gentile on Friday to do it on the Sabbath.^{51a} A person imbued with profound piety would scarcely rebel against this far-reaching ordinance but a modern person would view this rule as needlessly harsh inasmuch as it would deprive him of the pleasure of listening to exalted music.

Piety can of course, be carried to excess when it is not tempered with wisdom as the rabbis already observed. A young scholar⁵² was reciting in the presence of Raba bar Rab Huna the rule that killing serpents and scorpions on the Sabbath was considered improper by the pious. רוח חסידים בשבת אין. רוח חסידים נוחה הימנו. Whereupon Raba exclaimed that the sages are displeased with such pious folk, ואותן חסידים אין רוח חכמים, נוחה בהם.

9. *The Ends We Seek Influence Our Attitude*

In interpretation we must not indiscriminately adopt the consistent policy to be either strict and severe, or liberal and lenient. We must be guided by the ends we are seeking, namely the preservation of traditional practices in their typically Jewish form. In our days when the people have taken so many liberties

⁵¹ Cf. Wohlgemuth, *Jeschurun*, I, 184-186, 314-320.

^{51a} This rule goes back to Saadia Gaon, quoted by R. Asher (Baba Metsia VII.6). Cf. also Maimonides, *Hilkot Shabbat* VI.1, and the commentaries, *Orah Hayyim* 307.2; ראבי"ה (ed. Aptowitzer) I.434-5; R. Eliezer of Metz, ספר יראים השלם, no. 148, p. 142a and Responsa of R. Meir of Rothenberg, Budapest, 1895, no. 202, and M. J. Breisch, יעקב, Jerusalem, 1951, nos. 61-2, pp. 119-124.

⁵² Shabbat 121b.

with the ritual, we should insist upon their performance and adopt a stringent attitude just as Rab did when he noticed violations of the law due to ignorance in his day רב בקעה מצא תורד בה נדר.⁵³ On the other hand when justice to individuals is involved, in such cases there is no question but that the courage to be mild is more meritorious כח דהתירא עדיף.⁵⁴ In general, it would be safe to say that our attitude must vary depending upon the case or situation at hand, because no unbreakable rule can be laid down.

10. *Continuity of Jewish Law*

One of the most fundamental principles in our approach to Jewish law must be the preservation of the continuity of Jewish tradition which was maintained in unbroken succession from remote antiquity. The first paragraph in *Abot* enumerates the links in the chain of tradition from Moses to the men of the Great Synagogue and Maimonides in his introduction to the *Mishneh Torah* enumerates the links in the chain down to the time of R. Ashi. Now when we maintained before that the Talmud is our final authority, we did not contemplate a reversion to the laws and customs of that period. We would not advocate a *Heter* for eating chicken with milk because it was customary to do so in the locality of R. Jose the Galilean.⁵⁵ That would be impossible and absurd as for the English to relapse into Elizabethan manners and speech. The principle of continuity was well expressed by the Geonim in the legal maxim "the practice is in accordance with the latest authorities" הלכתא כבתראי. Accordingly the decisions of the *Aharonim*, the *Shak*, the *Taz*, the *Magen Abraham*, and the *Be'er-Heteb* are valid for us in so far as they represent persistent and characteristic trends in the continuity of the Jewish tradition.

⁵³ Ḥullin 110a, similarly R. Manashia was strict in his decisions to questions put to him by the people of Cascara (for the name, cf. *J. Q. R.*, N. S., 27, 1936, p. 71, note 11) because they were lax in observance.

⁵⁴ Berakot 60a.

⁵⁵ Shabbat 130a.

Thus I have endeavored to sum up in a general way the notions and ideas that regulate our interpretation of the law of today. These are in the main the same principles that guided the rabbis of the Talmud⁵⁶ and of the Middle Ages. The problems are different today because the social life and the political conditions and the Weltanschauung, as well as the economic circumstances of the Jews of those times have been basically transformed.

III

What is the nature of the difficulties that confront us now?

(1) There are cases where the law is clear but it is out of harmony with economic conditions, and is accordingly impossible of observance by many of those who are inclined religiously, e. g. the closing of shops on the Sabbath; others living in small communities where there is no *shohet*, or those whose business requires them to travel find it well nigh impracticable to observe the dietary laws, not to speak of the regulations concerning food prepared by Gentiles *בשול עכו"ם*.⁵⁷ With regard to these infractions our attitude can only be that we must wait for a more favorable change of circumstances that will aid in the observance of these rules.⁵⁸

(2) Other religious precepts for social reasons are very difficult or inconvenient to perform. In little villages, where the members of a congregation are scattered over wider areas, and live far from the synagogue, they find it compulsory to travel on Friday night if they wish to attend services. I doubt whether a halakic remedy can be found.⁵⁹

Other rules are at variance with the manners of Western

⁵⁶ The rabbis realized too that times had changed, cf. D. Stössel, "Von den Abänderungsmöglichkeiten in rabbinischen Schriften unter besonderer Berücksichtigung des *האידנות* Principis," in *Kroner-Festschrift*, Breslau, 1917, pp. 27-66; and *supra*, p. 54 note 53.

⁵⁷ *Yoreh De'ah* 113.

⁵⁸ *Baba Kamma* 28b.

⁵⁹ Cf. responsum by Toledano, *loc. cit.*, no. 28.

civilization such as the prohibition of shaving.⁶⁰ From the responsa of the eighteenth century we learn that shaving was quite common among the Jews of Italy. בענין גלוח הפאות. שבעונותינו הרבים הדור פרוץ בכל עיר ועיר. The violation of this law provoked some halakic complications such as the question whether a person who shaved was competent as a witness inasmuch as he transgressed a Biblical law. There is an interesting responsum by Lampronti written in Ferrara in 1734 in the *Paḥad Yitshak*⁶¹ which vividly portrays conditions very analogous to those of our own day, which I cite at length: A, before he died, made out a will, in which he bequeathed all of his property to his mother, and left nothing to his four sisters. After A's death, his mother entered into possession of the estate which she bestowed as a gift while still living, on her two sons-in-law. After a year and a half she died, and the sons-in-law assumed title to the property. Then the four sisters of A instituted a suit against the two sons-in-law on the ground that they were unjustly disinherited by their mother, for according to the civil and natural law (כפי נמוסי חוקות הגוים ודתי הטבע) they were entitled to their *legitim* (הליניטמא),⁶² i. e. the portion of the estate to which upon the death of the parents, the children are entitled and which cannot be affected by any testamentary provision made by the decedent without cause. Furthermore they claimed that the mother's title to the property was invalid because one of the witnesses to the will was disqualified inasmuch as he used to drink Gentile wine (סתם יינם), and being a barber, shaved himself and others. Hence the mother had no legal right to give the property to others.

The defendants claimed first that *legitim* is not recognized by

⁶⁰ Cf. *Jewish Encyclopedia*, s. v. "Beard."

⁶¹ S. v. פסולין סן החורה, pp. 35-36, cf. also פתחי תשובה to 'Eben ha-'Ezer 42.5, Isaac Handel, ערות לישראל, Vienna, 1866.

⁶² For *legitim* in Roman law, cf. F. Mancalione, "Le donazioni tra virie la legittima del patrono nel diritto romano classico" in *Studi di diritto romano in onore di Vittorio Scialoja*, Milan, 1905, Vol. II, 609-25, and for Italian law, cf. M. C. Zanzucchi, *Le Successioni Legitime*, Milan, s. a., G. La Pira, *La Successione ereditaria ab intestato a contro il testamento*, 1930, and Kreller, *Römisches Recht*, Vienna, 1950, p. 245, notes 2-3.

Jewish law and that they were unaware of the fact that the witness was incompetent, since he was upright in business and was the keeper of the royal seal. Heretofore witnesses were never barred for drinking Gentile wine or shaving and were allowed to attest wills, marriage certificates and writs of divorce.

The rabbi decided that the plaintiffs were not entitled to redress on the ground of *legitim* as Jewish law does not recognize the *jus naturalis* (דת הטבע) and the Mishnah states explicitly that if one disinherits his children, the act is valid but the sages disapprove of the action הכותב נכסיו לאחרים הניח את בניו. ⁶³ מה שעשה עשוי אלא אין רוח חכמים נוחה הימנו. This rule has been accepted by all the codifiers.

With regard to the impeachment of the witness, the following must be considered. He could not be barred on the first charge preferred against him on the grounds of drinking Gentile wine because that is only a rabbinical prohibition, and the rule is that persons who have violated rabbinical ordinances do not become disqualified to testify until it has been announced in the synagogue.⁶⁴

The second charge preferred against the witness was more serious, since shaving is prohibited in the Bible. But even in the case of the violation of a Biblical law, a person is barred from acting as a witness only if he realizes the gravity of his crime, as Maimonides pointed out,⁶⁵ and is aware that it disqualifies him from testifying. But this is not the case here since shaving has become so common that even the rabbis refrain from rebuking the people for it, in accordance with the maxim "Just as it is proper to admonish a person who will obey, so it is improper to admonish one who will disobey" כשם שמצוה לאדם לומר דבר הנשמע כך מצוה שלא לומר דבר שאינו נשמע,⁶⁶ and consequently he could

⁶³ Baba Batra VIII.5. The prohibition of גילוח in Scripture was interpreted by the rabbis to mean removal of the beard by a razor, but not by scissors, cf. *Yoreh De'ah* 181.9, and also Isserlein, תרומת הדשן, no. 295. For the custom among the Romans, cf. Marquardt, *Das Privatleben der Römer*, 2nd ed., pp. 598–599, Blümner, *Die Römischen Privataltertümer*, 1911, pp. 267 ff.

⁶⁴ Cf. *Hoshen ha-Mishpat* 34, 23.

⁶⁵ *Hilkot 'Edut* XII.1.

⁶⁶ Yebamot 65b, Y. Terumot V end and parallels.

not have perceived the seriousness of the offense. Furthermore since the sisters did not begin their suit during their mother's lifetime they indicated by this silence their abandonment of the claim, and whereas the will was made in anticipation of death, no witnesses were necessary, as the testament was undisputed. Lastly, it would be against the general welfare to disqualify this person, because ever so many marriage certificates and other documents were signed by persons who committed the same offense. I have quoted in extenso to show how R. Isaac Lampronti dealt with problems not merely in a legal manner but considered also the public good.

(3) There are cases where the circumstances inflict hardships and injustice on innocent parties. I am referring to the enforcement of the Jewish law of divorce in the present social and economic setup. This is a matter which no rationalization can gloss over. We cannot consistently be deaf to the pleas of the suffering *Agunah* and profess belief in the sublime utterance of Jeremiah: "I am the Lord who exercises mercy, justice and righteousness in the earth; for in these I delight, saith the Lord."⁶⁷

Furthermore, as Professor Ellwood has well said: "Judaism got its lofty moral tone from the projection, idealization, and spiritualization of the values found in the ancient Jewish family. The concepts and phraseology of Judaism can indeed be understood only through understanding the ancient Jewish family."⁶⁸ This lofty moral tone must also be extended to those cases of unavoidable frustrations in family life, especially since Judaism permits the marriage bonds to be torn asunder. It is a historical fact that the main objective of the rabbis in their rulings on divorce was to shear the husband of the plenary powers granted to him by Scripture by introducing technicalities with regard to the writ of divorce in order to protect the woman. Hence they required a *Get* to be written specifically for the woman לשמה; that the husband order the scribe in person to write the

⁶⁷ IX.23.

⁶⁸ *Reconstruction of Religion, a Sociological Study*, New York, 1922, p. 193.

Get without being able to delegate this authority to another מילי לא מיסרי לשליח. They recognized grounds which entitled the wife to sue for divorce. In case when the husband met with foul play, they dispensed with the usual requirement of two witnesses to certify the fact of death in order to permit the wife to remarry. How does the problem arise? The iron clad rule which permits a *Get* to be written only by the express command of the husband, leaves the woman without redress when he has disappeared, or refuses to grant her a *Get* although he may have obtained a civil divorce and remarried. The situation is aggravated in our time because the Bet Din cannot always exercise a persuasive influence over a refractory husband.⁶⁹

This problem, to be sure, has been agitating the rabbis for a long time, and it is the oriental rabbis who have been more alert. A variety of solutions have been offered to the public.⁷⁰ A rabbi of Egypt has proposed the conditional marriage to be set aside at the discretion of the court בית דין שירצה.⁷¹ Aside from the possible halakic uncertainties, it robs matrimony of the stability and the equilibrium such a fundamental human institution requires. The late Louis Epstein in his proposal⁷²

⁶⁹ Cf. *infra*, p. 110.

⁷⁰ Cf. Margulies, "Kiddushin al Tenai," in *Rivista Israelitica*, IV (1907), 87-91; Shapotnik, *Herut 'Olam*, London, 1928; Lubetzki, *En Tenai be-Nisuin*, Vilna, 1930; Henkin, *Perusha Ibra*, New York. In June 1953 the Rabbinical Assembly adopted a proposal submitted by Professor Saul Lieberman to alleviate the plight of the *Agunah*. It took the form of an ante-nuptial agreement appended to the *Ketubah*. In this special clause both parties to the marriage agree to submit their irreconcilable differences for arbitration before the national Bet Din of the Rabbinical Assembly. (For special clauses in the *Ketubah*, cf. Epstein, *The Jewish Marriage Contract*, 1927, pp. 269-283). In the event where one of the parties refused to abide by the decision of the national Bet Din, then the latter would be able to refer to the civil courts for the execution of their judgment, cf. Solomon Gutstein, "Civil Enforceability of Religious Ante-Nuptial Agreements," in *University of Chicago Law Review*, 23 (1955), no. 1, pp. 122-132.

⁷¹ Hayyim Moses Bigrano, *Kiddushin al-Tenai*, 1925, Toledano in ים הנדול, no. 74. His plan was opposed by Ben Zion Uziel in משפטי עזיאל, Tel Aviv, 1935, Vol. II, nos. 45-46. Uziel wrote against the תנאי על קידושין issued by the Turkish rabbis, *loc. cit.*, no. 44.

⁷² הצעה למען חקנות ענינות, New York, 1930. In *Li-sheelot ha-Agunah* Epstein

tried to circumvent the law by arranging for the husband at the time of marriage, to appoint a *Sheliaḥ* to order a scribe to write a *Get* to be delivered in case of certain contingencies. This arrangement apart from other considerations seems to be totally out of harmony with the spirit of halo and consecration that attends the marriage ceremony, when human feelings run very high, to ask the husband to dictate in cold calculation, arrangements for a possible future rupture of the matrimonial relationship. There is, it is true, precedent for such a procedure in Babylonian Law.⁷³

The question has often been raised whether we should seek relief for the *Agunah* by exploring the possibility of interpreting the law of annulment.⁷⁴ The Mishnah⁷⁵ for example recognizes the principle of קדושי טעות, whereby the betrothal is null and void if one of the parties to the betrothal was a victim of fraudulent misrepresentation. The theory underlying this rule is as follows: If the mistake induced by fraud or misrepresentation was fundamental enough, then there never was real consent, and the

reprinted his הצעה, published the proposal of Ben Zion Alkalai and discussed the various halakic objections that have been lodged against his *Takkanah*.

⁷³ Cf. Barton, *A Sketch of Semitic Origins*, New York, 1902, p. 46, note 2. This was a regular feature in ancient oriental and later Greek marriage contracts.

⁷⁴ Cf. Epstein, "Marriage Annulment" in the *Proceedings of the Rabbinical Assembly*, 1928, pp. 71–83. A Portuguese rabbi, Samuel ben Halat of the 15th century tried to solve the *Agunah* problem by annulment, cf. Toledano in אוצר החיים, 1930, pp. 210–224 and his הנדול, no. 74.

⁷⁵ Kiddushin III.5, cf. Tosefta II.5. R. Joshua ben Korḥah explained that David married two sisters because his betrothal to Merab was a קדושי טעות. (Sanhedrin 19b, Kimḥi to I Sam. 18.22). According to another version, Doeg advised Saul that David was no longer married (וכי יש אישוח לרוד) since he committed lésé majesté (cf. Sam. 20.13) and is considered dead. Now permit his mate (קונעת), cf. Theodor-Albeck, *Genesis Rabbah*, p. 289, and Ginzberg, *Legends*, v.45) and declare him ξητηρός as if he were dead, and his life forfeit. So Saul on his advice gave Michal, who was David's wife, to Palti ben Laish. (Genesis Rabbah 32.1 and 18.1). For R. Solomon ibn Adret's view that a prophet answered David that Palti ben Laish did not cohabit with Michal, cf. his *Responsa*, I.10, and Rashi to Gen. 20.7. For the term ξητηρός, wanted for arrest, hence an outlaw, cf. Bickerman, *Revue de l'Histoire des Religions*, vol. 112 (1935), 214, and Taubenschlag, *Law of Greco-Roman Egypt*, vol. II, 29–30, cf. especially Septuagint to I Sam. 20.1.

betrothal being a contract, requiring the consent of both parties, is void. R. Simon ben Zemah Duran⁷⁶ and other authorities follow this line of reasoning in case where one of the parties to the marriage was impotent at the time of nuptials. 'Tis true that the medieval authorities⁷⁷ went beyond the view of the Mishnah and annulled the betrothal only when there was a double stipulation *תנאי כפול* and other technicalities.

The Talmud rejects categorically the legal validity of the hypothetical suggestion that a woman would not have given her consent to marriage if it ultimately led to very disagreeable circumstances⁷⁸ *אדעתא דהכי לא קרשה עצמה*.^{78a}

As for the problem of a recalcitrant *Yabam*⁷⁹ who declines for purposes of extortion to undergo the ceremony of *Ḥalitsah*, I see no remedy.⁸⁰

(4) There are many points of law which are uncertain and are the subject of controversy. Numerous instances may be

⁷⁶ Responsa no. 1, cf. E. Goldberg, *כוחא דהיתרא*, New York, 1922, where the entire question is fully dealt with.

⁷⁷ Thus Rashi explains *טעוה קידושי* in Ketubot 51b as referring to *תנאי כפול*. It is interesting to note that while M. Kiddushin III.5 is literally repeated in the *Mishneh Torah*, *Ishut* VIII.6, it is omitted entirely in '*Eben ha-'Ezer* 38.24. Cf. Tosafot, Kiddushin 49b, s. v. *דברים* who felt that there were cases where fraud was a ground for invalidating a contract. Cf. also Tosafot Yebamot 2b, s. v. *א* and R. Asher, Yebamot I.3.

⁷⁸ Baba Kamma 110b, cf. also Responsum of R. David Cohen, IX.8, ed. Saloniki, 1803, 67d.

^{78a} The halakic principle *קרשה על תנאי ובעל צריכה הימנו נט*, Ketubot 74a, '*Eben ha-'Ezer* 38.35) as well as its corollary *אין תנאי בנושואין* (Yebamot 107a) practically eliminate any legal possibility for allowing a loophole for the annulment of marriage.

⁷⁹ There are many responsa which deal with such instances. Of particular interest is the case of David Bindigo of Avignon discussed at length in the Responsa of Moses Galante, no. 77. For the rarer case of a stubborn *יבמה*, cf. Responsa of R. Nissim, no. 61. R. Samuel di Medina, (Responsa, '*Eben ha-'Ezer*, no. 67) says that the recalcitrant levir may be compelled to comply with his duty by whipping.

⁸⁰ Lampronti officiated once at a wedding where the *קידושין* were given on condition that the marriage would be void if the husband died without issue, in order to obviate the *חליצה* ceremony. This he did with the approval of Mordecai Bassano, cf. *Paḥad Yitshak*, s. v. *אח*, ed. Lyck, 1864, 102b.

cited from the codes and commentaries.⁸¹ I shall make mention of two cases which are of current interest.

First is the question concerning the validity of civil marriage.⁸² Already in the last century sore disagreement existed among the authorities as to whether such a marriage necessitated a *Get*. In more recent times the late Professor Hoffmann⁸³ as well as Rabbi Joseph Rosin⁸⁴ decided that it did. We took the same stand on the question because it accorded with the general practice of the orthodox rabbis of this country, as well as for logical rather than for purely legal reasons. For it would have been unwise to deny the status of marriage to a couple who dwelt together as man and wife and were so reputed by all their friends, although a stamp of quasi approval is given to matrimony without religious ceremony. Civil marriage followed by connubial relations, has the same status that a common law marriage would have in Jewish law, for cohabitation without proper intent is not recognized as a way of establishing the matrimonial relationship. On the other hand this decision is not inconsistent with the refusal to recognize civil divorce, because in Jewish law, the termination of marriage is affected only through the instrumentality of a duly executed writ.

Secondly and much less momentous, is the question whether the sturgeon^{84a} is kosher or not, which hinges upon a correct and valid definition of scales, a moot point among the legal commentators. According to Nahmanides,⁸⁵ scales are round and

⁸¹ Already in early times there are references to uncertainties in the law that awaited decisions. Thus in I Maccabees IV.46 we read, "Until the prophet should come and decide," cf. Ginzberg, *Eine unbekannte jüdische Sekte*, pp. 303-317, where this matter is thoroughly discussed.

⁸² The literature on the subject is fairly extensive. The most important items are listed in the Appendix, *infra*, p. 243.

⁸³ סלמך להועיל, III.20.

⁸⁴ צריך I.26. Rabbi Rosin requires a special formula in the *Get*, נוסח אחר בנט, cf. also Kasher, *הרמב"ם והמכילתא דרשב"י*, New York, 1943, p. 107.

^{84a} Sturgeon was a delicacy among the Romans, cf. Pliny, *Natural History*, IX, 17.27, *Apud antiquos piscium nobilissimus habitus acipenser*, cf. also Marquardt, *Das Privatleben der Römer*, 2nd ed., p. 433, note 5. Blümner, *Die Römischen Privataltertümer*, Munich, 1911, p. 181.

⁸⁵ Commentary on Lev. 11.9.

horny plates like nails, removable from the skin by hand or knife, like the skin of fruit or bark of a tree, but if it is not removable at all, then they are no scales. This interpretation is based on the Aramaic rendering קלפין קשקש for קשקש. Rabbi Ezekiel Landau⁸⁶ is supposed to have permitted fish whose scales were removable only after having been soaked in lye water for three hours. Aaron Chorin,⁸⁷ disciple of Ezekiel Landau and one of the earliest reform rabbis in Hungary also allowed it. A storm of controversy followed his decision and among the Orthodox rabbis, it became a battle-cry against Reform.

The question is still unsettled as to what is the accepted legal definition of scales, and whether the sturgeon has scales in the ritual sense of the term.⁸⁸

Finally there are problems, many of a congregational character,⁸⁹ for which there are no precedents in the *Shulhan Aruk*, and which actually do not involve a question of law, such as the following: May a Jew who has married an unconverted Gentile woman enroll as a member in the congregation, or may women sit on the *Bimah* during Divine services? And many others. In answering such questions we are to be guided by a sense of propriety and expediency as well as by an intuitive feeling as to what is the Jewish way of dealing with those situations. I have been able here only to touch upon a few of the most striking maladjustments in our midst, but I hope I have succeeded in indicating an acceptable approach to their solution.

Before concluding I wish to make a plea. Historians have argued interminably over the question whether the leaders of a generation mould the ideas and influence the conduct of their age or merely voice the inarticulate aspirations and sentiments of their fellow-men. In truth both views represent the two sides of a medal. Now it is our duty as trustees of the legacy of

⁸⁶ נודע ביהודה, 2nd series, *Yoreh De'ah* 28, cf. also R. Shapiro, *to Dרכי חסובה* 83.1, note 12.

⁸⁷ Cf. *Jewish Encyclopedia* IV.43, where the controversial literature is cited.

⁸⁸ Cf. *פחתי חסובה* to *Yoreh De'ah* 83 and Hoffmann, *מלמד להועיל* II.21, and *Pahad Yitshak*, s. v. דגים.

⁸⁹ Cf. *Shabbat* 139a, *Hilkot Tsibbur*, the *Halakot Gedolot*, too, has a section entitled *Hilkot Tsorke Tsibbur* (ed. Warsaw, 1876, pp. 90–92).

Judaism⁹⁰ to direct our people in the right use thereof. This we can do if we are acquainted with the terms of the legacy.

I wish to make a plea for a renaissance of the study of Jewish law in our midst. I am thinking of the study of that part of the law that was traditionally considered as prerequisite for rendering authoritative decisions on ritual law.

An intensification of the study of Jewish law will (1) dissolve the feeling of inadequacy provoked by insufficient halakic learning. (2) It will enable us to use the *Shulḥan Aruk* more intelligently as a guide for religious practice and to render more authentic decisions. (3) It will raise the prestige of the Rabbinical Assembly to a point where it will command more authority and respect of כלל ישראל in matters of law.

In conclusion, I shall paraphrase a Midrash on the merits of the study of the law. When Jeremiah exclaimed: " 'Who is the wise man, that he may understand this? And who is he to whom the mouth of the Lord hath spoken, that he may declare it? Wherefore is the land perished and laid waste like a wilderness, so that none passeth through?' Neither sage nor seer nor seraph could venture a reply. The Lord saith: Because they have forsaken my law על עזבם את תורתִי. Would that they had rather forsaken Me but pursued the study of the Torah, for the powerful illumination emanating from the Torah would have led them back to the right way and brought them nigh unto Me הלואי אותִי עזבו ותורתִי שמרו מתוך שהיו עוסקין בה המאור שבה היה מחזירן למוטב."⁹¹

⁹⁰ Cf. Deut. 23.4, where the Torah is spoken of as an inheritance.

⁹¹ Cf. *Eḳah Rabbah*, Introduction, I.1, Y. *Ḥagigah* I, 76c, *Nedarim* 81a and ps. Rashi, *ad loc.*

CONCERNING THE JEWISH LAW OF DOMESTIC RELATIONS*

The theme that I am scheduled to treat is wide in scope. No legal institution is at once so universal and so fundamental a part of the social system of modern society as is marriage. None affects the inner life of a nation so profoundly or in so many ways, ethical, social, and economic. May I alert you to the fact that the matter of domestic relations poses the most turbulent problem not only in Jewish law, but in every known system of private law, and divorce is the most disconcerting part of the entire system of family law. As James Bryce forcefully put it: "When the question is asked, what is the best divorce law? the only answer can be 'There is no good divorce law. There are faults in human nature which have always existed, and apparently will always exist, and there is no satisfactory method of dealing with them, all that can be done is to choose between different evils.'"¹

The celebrated justice of the supreme court, O. W. Holmes once remarked: "If we consider the law of contracts it is full of history." If this is true of the common law, how much more is it applicable to Jewish law which has such a longer history. I mean to treat somewhat casually some phases of the law of domestic relations and try to relate them to the difficulties created by the inequality of the status of women vis-à-vis the Jewish marriage contract without divorcing them from their historical setting. I have in mind the spiteful husband who refuses to grant his wife a *Get*, although the marriage was civilly abrogated, the ruthless man who deserted his wife, or the hapless husband who disappeared without leaving a trace of his whereabouts, as well as the man who lost his mind after he found a

* An Address delivered at the Joint Law Conference of the Rabbinical Assembly on February 24, 1953.

¹ *Studies in History and Jurisprudence*, 1901, p. 853.

wife. For the victims of these circumstances, the law at present offers no remedy.

The Jewish law of divorce is based primarily on the Talmudic elaboration of Biblical law. The rabbis, being the authentic and recognized expositors of the Law, it behooves us to study and penetrate into the nature and spirit of their interpretation. To apprehend the nature of their approach to Scripture, it may well be enough to delve into their system of hermeneutics, and discern their analytic power as logicians. But to catch their spirit and manner of adopting a living law to a changing scene, it will be imperative for us to envisage their philosophy of law, their ideas about the role of the family in Jewish society, and their psychology of the nature of man.

It is true that the letter of the law was especially precious to the rabbis inasmuch as the Torah was deemed by them to be the word of God. Yet we should not forget what Whitehead reminded us: Today there is but one religious dogma in debate. What do you mean by God. This is the fundamental religious dogma.² The rabbis of the Talmud obviously knew what the belief in the divine ancestry of the law meant to them,³ and it manifestly was compatible with their flexible interpretation of the law. Rarely have civil judges, dealing with admittedly purely human law, allowed themselves more freedom with the words of an ordinance than have the rabbis with the sacred text of Scripture. The rabbis who conceived Jewish law as being dual in nature,⁴ for they contrasted דברי חורה with דברי סופרים

² Quoted by Robert J. Hutchin, *Frankness in Religion*, New York, 1929, pp. 159-160. Whitehead was anticipated by Cicero who wrote "that the opinions we are to hold about religion, piety, and holiness, about ritual, about honour and loyalty to our oaths, about temples, shrines, and solemn sacrifices . . . all of these questions depend upon the question of the nature of God" (*De Natura Deorum*, I.6, 14).

³ The rabbis remarked, if you learned a doctrine which gratified you even from a simple Jew, you shall treat it as if it came from a great man, or a sage or a prophet or from Moses himself, nay, even as if it emanated from Providence, Y. Sanhedrin X.1 (28a) and parallels אמ שמעתי דבר מפי קטן ישראל והנייך אמ אלא כשומעו מפי הגבורה לא יהא בעיניך כשומעו מפי קטן . . .

⁴ Cf. *Proceedings of the American Academy for Jewish Research* XX. 1951, p. 233.

or דאורייתא with דרבנן would fully agree with Ulpian's definition of jurisprudence⁵ as being the knowledge of Divine and human matters,⁶ of what is just and what is unjust, *Juris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia* (Digest I.10.2).

As I have been taunted for dwelling persistently on the rabbinic doctrine of the divine origin of the law may I wryly and proudly refer to the supreme self-confidence of the early settlers of my native State, Connecticut, who proclaimed that their colony would be governed by the laws of God until they found time to make better ones.

Unlike Paul, who flaunted the thesis that the inexorable letter of the law was the very antithesis of its pliant spirit, the rabbis conceived the law to be a subtle synthesis of its letter and spirit.⁷

What are some of the notions they entertained about matrimony which have a bearing on our problem? The rabbis regarded marriage, in the main, as a great blessing for the individual and society. They dissented widely from Menander⁸ (a Greek writer of tragedy of the third century BCE) who maintained that marriage, if one will face the truth is an evil, but a necessary

⁵ Cf. Senn, *Les Origines de la Notion de Jurisprudence*, Paris 1926, pp. 1 ff. Donati, *Archivio Giuridico*, 98 (1927) pp. 66 ff. and Arias Ramos, *Derecho Romano*, Madrid, 1947, p. 30 note 31. Philo too makes the same distinction with respect to wisdom which he derived from the Stoics, cf. *Quis Rerum Divinarum Heres*, XXXVIII, 182 and *De Congressu* XIV 79. Cf. also Cicero, *Nemo igitur vir magnus sine aliquo adflatu divino umquam fuit*, (*De Natura Deorum* II, LXVI, 167). Symonds remarks that "The study of Roman law, which was one important precursory symptom of the Renaissance owed much to the medieval respect for the empire as a Divine institution (*Encyclopedia Britannica* vol. 23 (11th ed.), p. 84).

⁶ For the concept of the law as divine and human, cf. B. Natanyahu, *Don Isaac Abravanel*, 1953, p. 155.

⁷ Philo remarks that the term finger of God (Ex. 8.19) is equivalent to the divine letter of the law (ἰσσοῦν τῷ γράμμα θεῶν) declaring that sophistry is ever defeated by wisdom (*De Migratione Abrahami* XV.85), cf. also my article "Letter and Spirit in Jewish and Roman Law" in the *Kaplan Jubilee Volume*, English section (1953) pp. 109-133.

⁸ Fragment 651 K ed. Loeb Classics p. 514. Cf. also Hermann-Blümner, *Lehrbuch der Griechischen Privataltertümer*, 1882, 3rd ed. p. 260 note 2.

evil. τὸ γαμεῖν ἔάν τις τῇν ἀλήθειαν σκοπῇ, κακὸν μὲν ἔστιν ἀλλ' ἀναγκαῖον κακόν. On the contrary the rabbis speak in lavish terms about the boon of matrimony. They believed that it created the proper atmosphere in which happiness, security and spiritual blessings could be best sustained; כל מי שאין לו אשה שריו בלא שמחה בלא ברכה בלא טובה בלא חומה ובלא תורה (Yebamot 62b). No wonder the rabbis ever had their eyes fixed on goals which encouraged the preservation of the family ties as much as possible and the maintenance of high standards of purity and integrity.

Thus R. Eleazar ben R. Jose explained that a man who divorced his wife because of strong rumors about her morals could not remarry her בעריות פרוצות בנחל ישראל (Gittin 46a). R. Johanan ben Nuri, on the other hand, objected vehemently to R. Akiba's lenient ruling that a woman may be divorced on account of the idle gossip of other women, because of the fatal effect it would have on Jewish family life לאברהם בת לאברהם אם כן לא הנחת בת לאברהם (Gittin 89a). Again the Amoraim gave as one reason for Raba's rule אין אונס בנישין (Ketubot 3a) as a measure to prevent women who are free and easy (פרוצות) from taking undue advantage of a conditional divorce. Their sense of equity operated to maintain also a just balance between the rights of husband and wife as far as it was consistent with the letter and spirit of the law.

The rabbis being no idle idealists, but consummate connoisseurs of the nature of man, realized despite their own doctrine that marriages were made in heaven,⁹ that these self-same unions had to be consummated on earth, to borrow a phrase from the 16th century French jurist¹⁰ Loisel, (1536-1617) and alas! some of these did run aground and had to be salvaged. Forsooth, it may be asserted that the rabbis deplored divorce as an evil, indeed it was a necessary evil. Even the Palestinian Amora R.

⁹ Cf. Abrahams, *Book of Delight and other Essays*, pp. 172-183, and Ginzberg, *Legends of the Jews*, V. 75, note 20.

¹⁰ Les mariages se font au Ciel, et se consomment en la terre, *Institutes Coutumières*, I. 2, 88, ed. M. Reulos, Paris, 1935, p. 28. Cf. also Troplong, *De l'influence du Christianisme sur le droit civil des Romains*, 3rd ed. Paris, 1868, p. 237.

Eleazar, who voiced the view that even the impersonal altar shed tears over such a personal tragedy **כל המגרש אשתו ראשונה** would agree, albeit sorrowfully, with the Babylonian Amora, Raba, who declared that a man must needs divorce if he got a shrew for a wife (Yebamot 63a) **אשה רעה מצה לגרשה**.

The terms under which a marriage may be terminated must have perplexed many an exegete ever since the law was laid down in the Torah limiting the husband's right to divorce his wife only on the ground of unseemly or immodest behavior **ערוה דבר**. The historical meaning of this text was known to the rabbis as is evident from the tradition preserved by R. Meir.¹¹ But to jurists of a living law,¹² this interpretation was inadequate. Incidentally it may be well to distinguish between pure exegesis when its purpose was simply theoretical, and interpretation when its intention was to meet an immediate need.

During the first century of the common era, for many reasons, marriage ties were not so firm in the Greco-Roman world¹³ of which the Jews constituted a part, and the grounds for divorce became a paramount issue among the Jews. The classical Roman law of this period, provided for the dissolution of the marriage if either party became disillusioned with the partnership.¹⁴ This rule was known to the rabbis as we learn from the Y. Kiddushin I.1 **שניהם מגרשין זה את זה**. Josephus relates that Salome, the sister of Herod after quarreling¹⁵ with her husband, sent

¹¹ Gittin 90a, in the Y. Gittin end, and Sotah I.1 it is given in the name of the school of Shammai.

¹² Jolowicz points out that utility, that is the practical aspect of the law must not be sacrificed to elegance, namely, exact historical scholarship, cf. "Utility and Elegance in Civil Law Studies" in the *Law Quarterly Review* 65 (1949), pp. 322 ff.

¹³ Cf. Muirhead, *Historical Introduction to the Law of Rome*, London, 1916, pp. 223-224, 274-275.

¹⁴ An allusion to the right of women to sue for divorce in Greek law, (cf. Beauchet, *Histoire Du Droit Privé de la République Athénienne* I, 381) is found in Philo, *De Cherubim* 115.

¹⁵ Cf. Boaz Cohen, "Divorce in Jewish and Roman Law," *PAAJR*, XXI, 1952, p. 20, note 83. For Paul's view (I. Cor. 7.15) cited there, note R. Ishmael's opinion in Midrash Tannaim to Deut. 23.15 (ed. Hoffmann, p. 148).

him a bill of divorce and dissolved her marriage with him in contravention of Jewish law (*Antiquities* 15.7.10). Similarly, Herodias divorced her husband in violation of Jewish law (*Antiquities* 18.5.4). These acts were the results of the influence of Roman law, which made an impression upon these assimilated ladies of the aristocracy.

An ascetic section of the Judeo-Christian community reacted to the extreme laxity of family ties of this time by prohibiting divorce altogether.¹⁶ However, the rabbis were guided by Scripture and common sense. The Beth Shammai, noted as conservatives, believed the best remedy to the situation was to permit a man to divorce his wife only if she were a hussy, hence they restricted the meaning of ערוֹת דִּבְרֵי to embrace only sexual unchastity. This view appealed also to the fancy of a puritanical group of the early Judeo-Christians.¹⁷

The Beth Hillel considered wedlock a covenant or contract between man and wife, under which they should experience all the blessings of a marital union. Consequently, the school of Hillel extended the meaning of ערוֹת דִּבְרֵי to include incompatibility even such as would result from the continuous culinary shortcomings of an awkward wife, who failed to realize that the way to a man's heart is via his stomach. As is well known, it is the view of Beth Hillel that prevailed.

R. Akiba's view אִפִּילוּ מִצָּא אַחֶרֶת נָאָה הִימָנָה was based on the conception, which has good Scriptural warrant, that marriage is grounded upon conjugal affection¹⁸ (Shabbat 64b) and its cessation gave the husband the right to divorce. The classical Roman jurists too considered *affectio maritalis*¹⁹ as the basis of marriage, hence their liberal view of divorce.

¹⁶ Luke 16.18.

¹⁷ Matt. 5.32.

¹⁸ Cf. Ibn Ezra to Deut. 24.1. Note also Prov. 30.21, Code of Hammurabi § 142, and the *Assuan Papyri*, ed. Cowley, no. 15. For Y. Ketubot 30b, cf. *PAAJR* 18, p. 83, note 71. This notion is also presupposed in the phrase חִיבָה חוּסָה קוֹנָה (Ketubot 56a), חִיבָה נִשְׁוֹאִין (cf. Rashi, Ketubot 47b, s. v. מִאֵן דִּאִמֵּר), חִיבָה בִּיאָה (Tosafot, Yebamot 94b, s. v. אֵלָא) and חִיבָה דִּנִּימָא אַחֲלִיָּה לְחִנְאִיָּה (אֵלָא) (cf. Rashi, Yebamot 107a).

¹⁹ Cf. *Digest* XXIV.1.32.13 and Albertario, *Studi di Diritto Romano*, I.195 ff. and Dumont, *Les Donations entre Époux en Droit Romain*, pp. 25 ff.

The rabbis were gravely concerned and disturbed over the inequality of the status of women with respect to the right to sue for divorce. They were aware that Scripture established a status of equality for women in certain areas of civil law *השוה* הכתוב *אשה לאיש לכל דינין שבחורה* (Baba Kamma 15a). But the letter of the law regulated the relations of the wife to the husband by the system which has been entitled that of subordination. They were fully cognizant of the fact that the Romans regulated the relations of wife to husband under the system of equality.

The rabbis, who were never lacking in ingenuity or resourcefulness, when they were convinced that their interpretation would be compatible with the letter as well as the spirit of the law, devised the following formula to remedy the inequitable and unilateral rights of the husband with respect to divorce. They accepted, in principle, the doctrine of equality for women to initiate divorce proceedings, but within the system of subordination. Thus the rabbis established grounds which entitled women to petition for divorce. They then implemented their enactment and circumvented the Biblical law by establishing the paradoxical doctrine of compulsory consent^{19a} *כופין אותו עד* (Gittin IX.8) *נט מעשה בישראל כשר* and *שיאמר רוצה אני* ('Arakin VI, end).

Some of the grounds that entitle a woman to sue for divorce are the husband's inability or refusal to perform his conjugal duties (Nedarim XI.12 Ketubot V.6), deprivation of her liberty to work (Ketubot V.5), cruel and inhuman treatment (Ketubot VII.2-5), non-support (Ketubot 77a), or if the husband developed leprosy or engaged in a malodorous business (Ketubot 7.10). Post-Talmudic authorities added other grounds, such

^{19a} This reminds one of the statement of Paulus: *Quamvis si liberum esset noluissem tamen coactus volui* (Digest, 4.2.21.5). For this passage, cf. M. Wyszynski in *Symbolae Taubenschlag*, Warsaw, III (1957), 475-491. This maxim of Paulus is the origin of the medieval phrase *nolens volens*. Dr. Noble called my attention to the use of this phrase by the twelfth century scholar, R. Eliezer b. Nathan of Mayence, in his *Raban*, ed. Prague, 1610, f. 46c, which reads as follows: *לדעתו ושלם לדעתו בלע"ז קום בולט אקום נבולט*, i. e., *cum volet eum novolet*.

as licentiousness (*Eben ha-Ezer* 154.1) bad temper (154.3), wife beating (154.3) epilepsy (154.4) and incompatibility.²⁰

With regard to implementing this rule, the rabbis went so far as to permit the Jewish court to appeal to Gentile authorities to help it carry out their order *עשה אותו ואומרים לו עשה* ובנכרים חובטים אותו ואומרים לו עשה (Gittin IX.8). *מה שישראל אומרים לך וכשר*.

Maimonides rationalized the paradoxical doctrine of compulsory consent as follows: Every man means to comply with the law, but lacks the appropriate strength of will and character to do so. Therefore when a man yields to the order of the tribunal even after a sound thrashing and application of main force, his compulsory consent corresponds to his innermost wishes, and his compliance under duress is regarded as having a true ring (*Gerushin* II.19) *לפיכך זה שאינו רוצה לגרש מאחר שהוא רוצה להיות מישראל ורוצה הוא לעשות כל המצות ולהתרחק מן העבירות ויצרו הוא שתקפו וכיון שהוכה עד שתשש יצרו ואמר רוצה אני כבר גרש לרצונו*.

With respect to the laws pertaining to the grounds of divorce, the rabbis made sure to safeguard a devoted wife from the whims of a knavish husband, which found expression in the principle *להוציאה בעיניו קלה* *שלא תהא קלה בעיניו להוציאה*.²¹ Similarly, when they established grounds for women to sue for divorce, they were careful to protect a naive husband from the ruses of a wily wife *בעלה על בעלה* *שלא תהא אשה נותנת עיניה באחר ומקלקלת על בעלה* (*Nedarim* XI.14). R. Mesharshaya, too, was concerned over the problem when he observed *בנכרי עצמה ותולה* *שלא תהא כל אחת ואחת הולכת ותולה עצמה בנכרי* *ומפקעת עצמה מיד בעלה* (*Gittin* 88b). Tosafot, too, in their solicitude, remark *באשה שמא תקניטנו כדי שיגרשה ותגבה* *חשו חכמים באשה שמא תקניטנו כדי שיגרשה ותגבה* *כחובתה*.²²

The second serious problem the rabbis had to cope with was the disappearance of the husband. In Jewish law, continued absence of the husband, no matter how long, will not lay the

²⁰ Cf. Maimonides, *Hilkot Ishut* 14.8 *אם אמרה מאסתינו ואיני יכולה להבעל לו* *מדעתי כופין אותו לשעתו לגרשה לפי שאינה כשבויה שתבעל לשנוא לה וחצא בלא כחובה כלל*. This liberal view of Maimonides is combatted by most of the scholars, cf. the commentators *ad loc.*

²¹ Cf. Tosefta, Yebamot II.4, Babli 39a and 89b and *PAAJR*, 18, p. 83, note 66.

²² *Gittin* 48b, *s. v.* *וכחובת*.

foundation for a presumption of death after a period of seven years as in the common law.

During the first two centuries of the Common Era, constant feuds between Jews and Romans, widespread brigandage and robbery in Palestine, the undertaking of long journeys, and more frequent sailing on the high seas in search of trade, created a grievous problem when the husband disappeared without a trace of his whereabouts. In such instances, the wife could not remarry unless two competent witnesses produced positive evidence concerning the decease of her husband. This was oft well nigh impossible because of the nature of the circumstances.

R. Gamaliel the Elder, impelled by the terrible effects of the massacre of the Jews of Tel Arza, about the middle of the first century, took the first step to relax the rigor of the law, by permitting a wife to remarry,²³ if one witness was available to testify to the decease of her husband. However, this ruling did not meet with the approval of the scholars, for we find, about 75 years later, that the martyr, R. Judah ben Baba, braved the fiercest opposition of his colleagues when he followed the precedent established by R. Gamaliel.

While this ruling did not crystalize into an enactment,²⁴ it ultimately became the general practice (הוחזרו להיות משיאין) to allow a woman to remarry, if only one witness²⁵ could vouch for his demise, and even if ordinarily this witness was not competent, such as a slave, a woman, or indirect testimony.²⁶ How far

²³ Cf. M. Yebamot XV.7, and Derenbourg, *Histoire de la Palestine*, pp. 239-240.

²⁴ R. Judah derived it from Deut. 19.15, cf. Sifre Deut. 188, and Yebamot 87b-88a.

²⁵ With regard to one witness in case of the Agunah, cf. the long discussion by Judah Leib in his נעיל נן, Vilna, 1873, 2 ff.

²⁶ Cicero, relating the story of the marvelous memory of the lyric poet Simonides (c. 556-469 B.C.E.) tells how the latter was present at a banquet, and while he stepped out, the roof caved in and crushed all the guests. When their friends wanted to bury their dead, they were unable to distinguish not merely the faces, but even their limbs. Simonides was enabled by his recollection of the place in which each of them had been reclining at the table, to identify them for separate interment (*De Oratore* II.86,353, Quintilian, *Inst. Orat.* XI.2.13). Quintilian's statement: *non ora modo oppressorum, sed membra*

reaching this innovation appeared to later scholars may be gauged from Maimonides' remark (*Gerushin* XIII.29) אל יקשה בענין שהתירו חכמים הערוה החמורה בעדות אשה או עבד או שפחה.

However, the rabbis would have considered the Roman solution to the problem, with which they might have been familiar, utterly out of question. From a statement attributed to Julianus²⁷ (*Digest* 24.2.6) we learn: If it is uncertain whether the husband who is held by the enemy is living or dead, then, if a period of five years²⁸ has elapsed from the time he was captured, his wife will have the right to marry again, so that the first marriage will be held to have been amicably dissolved (*ut bona gratia dissolutum videatur pristinum matrimonium*) and each one of the partners will have his respective rights annulled. The same rule must be observed, where a husband remains at home, and his wife is taken captive.

With respect to the third problem, where the husband went stark mad, the Mishnah ruled that divorce was impossible, a step was taken by the Babylonian Amora, Samuel, who permitted an insane husband to give a divorce to his wife during his lucid moments as is reported in Y. Terumot I.1. Samuel's decision was in keeping with the Tannaitic ruling that an insane person who has lucid intervals is considered as a person of a sound

etiam omnia requirentes ad sepulturam propinqui reminds one of the law that required that the witnesses identify the deceased by recognizing at least his face and nose, cf. M. Yebamot XVI.3.

²⁷ Cf. E. Levy, "Verschollenheit und Ehe in Antiken Rechten" in *Gedächtnisschrift für Emil Seckel*, Berlin 1927, pp. 165 ff. A parallel to the Roman law is found in the Assyrian law which provides that a wife whose husband has been captured by the enemy, is given, after the lapse of a certain time, her tablet as a widow (Ass. *tuppaša ki almatte*) so that she can remarry, cf. Driver and Miles, *Assyrian Laws*, p. 413, cf. also pp. 256 ff. For the position of the wife of the missing husband (Mafkud) in Moslem law, cf. Santillana, *Istituzioni di Diritto Musulmano Malichita* I. (1926) 163-167. Further references may be found in Wensinck, *Handbook of Early Muhammadan Tradition*, Leiden 1927, p. 57.

²⁸ The reference in Y. Yebamot X.2 to a hypothetical erroneous decision of a Jewish court that ruled that a woman may remarry after five years after the disappearance of her husband might imply a bowing acquaintance with this Roman rule.

mind, and his transactions during those periods are valid²⁹ פעמים שוטה חלום. זה הכלל כל זמן ששוטה הרי הוא כשוטה לכל דבר, חלום הרי הוא כחלום לכל דבר.

However, later Babylonian Amoraim, as is reported in Yebamot 113a-b take it for granted that such a person, can betroth a woman in his lucid moments, but cannot divorce her. Hence Maimonides and R. Jacob ben Asher were reluctant to commit themselves on this question. However, R. Solomon ibn Adret decided in the affirmative and his view was accepted by R. Joseph Caro and has since become the general practice.

I grant that it takes less than a genius to recognize the fact that the interpretations of the rabbis are not entirely adequate today. For the doctrine of compulsory consent cannot be applied in territories where the Jewish court lacks jurisdiction because church and state are separate. The concessions made with respect to the disappearance of the husband does not take care of the case where not even a single witness is available concerning his death. The law offers no remedy to the woman who is at her wit's end because her irrational husband never had lucid moments, or if he did, he had enough wit to refuse a *Get*.

Contemplating the spectacle of chaos and confusion created by circumstances, human nature and the statute,³⁰ I fancy that many of you feel about this unhappy situation, as Samuel did about the Prosbol when he exclaimed עולבנא דדיינא הא פרוסבולא (Gittin 36b). We are confronted with a grave situation, but we have not reached an impasse, nor are the difficulties insurmountable. Serious as the dilemma is, it does not warrant a feeling of frustration. It is true that the truculent spirits of our age are out of patience with tradition and erudition, and seek refuge in intuition, but it may be not amiss to reiterate that "spiritual distress cannot and will not be banished by spiritual anarchy." I know it is much easier

²⁹ Boaz Cohen, "Concerning Divorce in Jewish and Roman Law" in *PAAJR* XXI. 1952, p. 21, note 86 and Mosheh Nahum Yerushalimski, באר משה, Warsaw 1901, no. 20, pp. 45-46.

³⁰ What R. Judah said to R. Meir applies with equal force to the Interpretation of Jewish Law: דיין מאיר אין דורשין שיר השירים לננאי אלא לשבח שלא נתן שיר השירים אלא לשבחן של ישראל. Cf. *Canticles Rabbah* I.12, ed. Vilna, p. 22.

to criticize than to understand,³¹ I shall choose the hard way and try to understand.

A learned Romanist, Ernst Immanuel Bekker³² by name, noted some differences between the function of the physician and the jurist, although the one treats the ailments of the body, the other deals with the ills of the body politic. The last thing one would expect from a good physician is to become hysterical in the face of a grave disease. Similarly, a jurist can ill afford the luxury of waxing emotional in the presence of a dire situation. It has been said of the ancient Greeks that their organic view of life saved them from arrogance without condemning them to littleness. This is equally true of the rabbis who kept their eyes fixed on a bit of the real world it was their task to understand, and they met the situations of their day without doing damage to the letter and spirit of the law. We can ultimately succeed if we are resolute in following in their footsteps by emulating their example and utilizing their doctrines.

Fundamental to the thinking of the rabbis is their conception of the immaculate and matchless continuity of Jewish law. Hence the rabbis of the Talmud magnified *חדוש* and recoiled from *שנוי*.³³ Thus when R. Jose ben Dormiskis³⁴ asked R. Eliezer in Lydda *מה חדוש היה לכם בבית המדרש היום* (Yadaim IV.3.) he replied: *נמנו וגמרו עמון ומואב מעשרין מעשר שני בשביעית*. The development of Jewish law, if that notion would have been known to the Tannaim and Amoraim, would have been considered by them as a product or function of *חדוש*. The term *חדוש* incorporated the notion of the emergence of new ideas that were submerged in the letter of the law and it embodied also the concept of the rejuvenation of its spirit. On the other hand, the term *שנוי* conjured up before them an idea of derogation because of its concomitant connota-

³¹ "There is always the risk," says Quintilian, "of falling into the common fault of condemning what one does not understand." *Inst. Or.* XI.1.26

³² "Das Römische Recht und die Rechtsformen der Gegenwart" in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung*, 33 (1912), p. 36.

³³ Note that in Prov. 31.5 the phrase *וישנה דין* is used with reference to the perversion of justice, cf. also *Bamidbar Rabbah* 10.4.

³⁴ Cf. Derenbourg, *Essai sur l'Histoire de la Palestine*, p. 223, note 2.

tion of abrogation. Takkanah itself would come within the perview of חרדו. It is curious that R. Asher, dealing with civil law, employs the term שנוי. Thus he writes (Baba Kamma III.12) הלכך על פי המנהג המצוי בינינו ישתנה הדין וחייב בעל הבית אפילו אם שכח בשוק . . . כל שכן שישתנה הדין בחלוף הזמן כפי המנהג.

Before attempts are ventured upon to remedy existing evils, there are some cardinal considerations we must bear in mind. What are the resources that are available and in what manner can and shall they be deployed?

At this juncture, I shall allude to three principles that have been cited as a basis to alleviate our present distress. These are briefly discussed in the book סדר קדושין ונשואין by the late Professor Alfred Freiman.

Firstly קדושין על תנאי.³⁴ Secondly, provision made for divorce at the time of marriage, e. g. the proposal made by Rabbi Alkalai and of the late Dr. Louis Epstein.³⁵ Thirdly, the judicial declaration of the nullity of marriage (אפסקעיהו רבנן לקדושין מיניה).³⁶

May I pause for a moment at this last point to make a historical digression. In the Talmud we find only two actual cases where a marriage was declared null and void. The first instance is where a woman consented to betrothal under duress (*vis et metus*) R. Ashi declared that there was no Kiddushin. Since the man acted improperly, the rabbis took extraordinary measures, a sort of *cognitio extraordinaria* and nullified the Kiddushin (Baba Batra 49a)³⁷ באשה ודאי קדושין לא הוו הוא עשה שלא כהוגן לפיכך עשו בו שלא כהוגן ואפסקעיהו לקדושין מיניה.

³⁴ Cf. *supra*, p. 94, note 70.

³⁵ In ancient times this procedure was considered quite appropriate, for the ancient Babylonians, cf. Barton, *A Sketch of Semitic Origins*, New York, 1902, p. 46, note 2. For the Egyptian Jews, cf. the Aramaic Papyrus circa 441 B.C.E., ed. Cowley, no. 15. For the Greek practice, cf. the Elephantine papyrus in Edgar and Hunt, *Select Papyri*, no. 1.

³⁶ Cf. the gloss of the מראה כהן to Yebamot 90b and Ḥayyim Algazi בני חיי, 1712, 96a. This book is always cited in the Be'er Heteb as בני חייא.

³⁷ We are using the term rather freely for, strictly speaking, in Roman law the term *cognitio extraordinaria* was applied primarily to the form of civil procedure where the distinction between *jus* and *judicium* disappeared, cf. Cornil, *Droit Romain*, Brussels, 1921, pp. 420-421 and Giffard, *Précis de Droit Romain*, Paris, 1938, p. 117.

The second case refers to a girl in Naresh who was betrothed while she was a minor. After she became of age, but before the marriage was consummated, another man eloped with her. In this case R. Bruna and R. Ḥananel ruled that a *Get* from the second husband was not required. R. Ashi gave the same explanation as in the case of betrothal under duress (Yebamot 110b).³⁸

R. Isaac ben Samuel of Dampière raised the question whether the declaration of nullity of marriage was not a special grant of power derived from the principle *יש כח ביד חכמים לעקור דבר מן החורה*.³⁹

From the fact that only two instances are cited, we see how wary and chary the rabbis were of using this grant of power.

Secondly, there are three instances in the Talmud where the doctrine of the nullity of marriage is buttressed by an entirely different principle, namely, *כל דמקדש אדעתא דרבנן מקדש*. What is highly significant is that the maxim *כל דמקדש אדעתא דרבנן מקדש* is quoted by the Amoraim *merely* to justify three rules of law, namely, a) The view of R. Simon ben Gamaliel *אינו בטלו יכול לבטלו* (Gittin 33a, Yebamot 90b), b) The view of Raba *אין אונס בנישין* (Ketubot 3a), c) The view of Rabbah and Raba⁴⁰ *שכיב מרע שכתב גט לאשתו וגירש ועמד אינו יכול לחזור בו נזירה שמא יאמרו יש גט לאחר מיתה*.

The consequences of the concept underlying the principle *כל דמקדש אדעתא דרבנן מקדש* are discussed in the early legal authorities.⁴¹ It is outside the scope of this paper to deal with the possibility of using this principle for our immediate problems. Suffice it for me to say, that the concept of *כל דמקדש אדעתא דרבנן מקדש* was so bold that the rabbis never applied it to an actual case.

It is noteworthy that the Classical Roman jurists who were fairly liberal with respect to divorce, would have regarded this doctrine of the nullity of marriage much too daring for them

³⁸ Cf. Freimann, *סדר קדושין ונשואין*, pp. 13–14.

³⁹ Tosafot, Yebamot 110, s. v. *לפיכך*.

⁴⁰ As formulated by Maimonides (*Gerushin* IX.16) on the basis of Gittin 73a which is in agreement with Rashi *ad loc.*

⁴¹ Cf. Louis Epstein, *Proceedings of the Rabbinical Assembly*, II, 1928, pp. 71–83 and Meiri to Ketubot 3a (ed. Schreiber, p. 14).

as may be deduced from a rescript from the Emperor Gordian who writes (between 223-245 C. E.): If after a marriage had been properly solemnized, something happens which would have been a hindrance to its validity, the marriage is not affected by the subsequent occurrence, *Rite contractum matrimonium ex post facto vitiari non potest*.⁴²

Our next question is in what manner can the legal resources available be deployed? Whatever innovations are to be introduced to remedy certain evils, they must be amenable to the existing framework of the law.⁴³ There is an old saying: "Striving to be better, oft we mar what's well." We cannot engraft upon the tree of Jewish law a foreign branch (זמורת זר) such as the principle of granting to women equal rights with the husband to *issue* a divorce. This fresh and special creation would merely be a form of nihilism rather than an interpretation.⁴⁴ Let us not forget that even in those nations where the principle of equality has been accepted, there is much confusion, delusion and collusion. If I may cite the prudent comments of a distinguished philosopher, "Family life, as Western nations possess it," says Santayana, "is still regulated in a very bungling, painful and unstable manner, Hence . . . a morality compacted of three inharmonious parts, with incompatible ideals, each in its way legitimate; How to surround the natural sanctities of wedlock with wise custom and law, how to combine the maximum of spiritual freedom with the maximum of moral cohesion, is a problem for experiment to solve. It cannot be solved, even ideally in a Utopia."

Perhaps it may be relevant and pertinent to recall in brief

⁴² *Code of Justinian* V. 6.3. Volterra considers this passage interpolated, cf. *Bulletino dell' Istituto di Diritto Romano*, 37 (1929), 239-245, cf. also Berger, *Seminar* VIII, (1949) 58.

⁴³ As the venerable Kalir, in the Piyyut בדעתו אביעה חידות put it זקנים וזקנים עד זקנים מורים חקונים כדת מחקנים.

⁴⁴ This does not mean that we must be indifferent to the fate of the Agunah. As the distinguished R. Joel Sirkes boldly asserted מי כל שמתיר ענונה אחת כאילו בנה אחת מחורבות ירושלים העליונה להציל בחינה אחת מן אשת חיל (ed. Koretz, 1785, 38d), Ḥayyim Palagi, חיים ושלום, Smyrna, 1872, II, no. 1, 2a, and Mosheh Nahum Yerushalimski, באר משה Warsaw 1901, Introduction, p. 3.

the discussion between R. Asher (Responsa 55.9) and R. Israel of Toledo⁴⁵ anent the Marriage Statute of Toledo of the 13th Century.⁴⁶ The Takkanot of Toledo⁴⁷ in one of its sections abolished the rabbinic law of succession between husband and wife and enjoined that the wife's estate should be divided equally between her heir and the husband. R. Asher, resented R. Israel's comparison of Jewish religious law (נורת הדת) with natural law (נורת השכל) and replied in part as follows: Our law may not be compared with the idle speculation of your science of logic, which no religious authority would ever cite as an argument in behalf of any civil or religious enactment לא תהא תורה שלנו כשיחה אשר הרחיקו כל חכמי הדת נביא ממנה אות או בטילה שלכם חכמת הגיונכם אשר הרחיקו כל חכמי הדת נביא ממנה אות או מופת לחייב ולזכות לאסור ולהתיר.

He then continues: It will not do, in my life time and under my jurisdiction, to pronounce decision on Jewish law on the basis of analogies with other systems.⁴⁸ Thank God, as long as I am alive, there is adequate learning in Israel, and arguments will be drawn from the Mishnah, the Babli and the Yerushalmi without any resort to analogies from other systems of law, האף אין זאת וכי בימי ובמקומי יפסקו הדינין על פי המשלים. ח"ל בעודי חי יש תורה בישראל להביא ראיה מהמשנה וגמרא בבליית וירושלמית ולא יצטרכו להביא משלים⁴⁹ לפסקי הדינים.

⁴⁵ Cf. Freimann, *J. J. L. G.* XII. 288.

⁴⁶ Cf. Teicher in *Essays and Studies Presented to Stanley A. Cook*, London, 1950, pp. 83-94.

⁴⁷ Cf. *Tur, Eben ha-Ezer*, 118.

⁴⁸ To what extent it is permitted to borrow rules from the Civil law to provide for situations not envisaged in Jewish law has been little investigated, cf. R. Eliezer of Metz, ספר יראים ed. Vilna 1881, who remarked ובחוספתא דשבת מונה כל מה שהיתה קבלה ביד חכמים שהם מחוקותיהם ואין להוסיף עליהם כי אין התורה לא פרשה דבר אלא אמרה בחוקותיהם לא חלכו ומסרה הדבר *Hilkot Abodah Zarah* XI.3 observes לא אמרה דבר אלא חלכו ומסרה הדבר על הקרובים למלכות *Yoreh Deah* 178, and Halkin in *Jubilee Volume in Honor of Louis Ginzberg*, Hebrew Section, p. 133.

⁴⁹ Al-Bukhari in his Ḥadit transmits a statement "How the Prophet taught his community, what Allah had taught him without *Ra'i* or *Tamthil*. This last term is explained as *Kiyas* in the *Commentary of Al-Kastallani*." Cf. Wensinck in the *Encyclopedia of Islam* II. 1051-1052. Dr. Moses Zucker calls

I dare say that R. Asher's pronouncement should serve as a fundamental axiom in our thinking about practical problems of law.

Let me repeat once more, that the rabbis drew a distinction between ritual and civil law. In the latter they were more lenient and flexible in their interpretation. But within the field of religious law rules concerning family law taken most seriously כיון דשרינן אשת איש לעלמא כדיני נפשות דמי (Yebamot, end),⁵⁰ and innovations involving the very structure of the law itself were unthinkable. Neither is there any validity in the argument that we must produce the saving formula forthwith, lest the prestige of the rabbis decline and fall. Again I invoke the Talmud משום מה כח בית דין יפה שרינן אשת איש לעלמא (Gittin 33a).

In choosing remedies for our present problems, solutions can only be selected that are right, proper, and acceptable. By right, we mean what is deemed valid in Jewish law by a body of scholars⁵¹ that is competent to pass judgment on them. Commenting upon R. Jonathan's interpretation (Yebamot 109b) of the verse (Cant. 3.7) הנה מטחו שלשלמה ששים נבורים סביב לה מנבורי ישראל, the Meiri remarks that King Solomon's Academy was

my attention to a chapter entitled قسم التمثيل in Ibn Hazm's *Kitab fi-Usul Al-Ahkam*, ed. Cairo, p. 45, and to the use of تمثيل meaning analogy by Saadia in a MS. Commentary to Exodus which he is publishing.

⁵⁰ Cf. also Tosafot, Makkot 6a, s. v. שמואל.

⁵¹ This is what Mosheh Rivkes frequently refers to in his באר הנולה as the הסכמת הפוסקים. This would be equivalent to the Moslem doctrine of *Ijma* in one of its meanings, namely, when it is used in the sense of *communis opinio prudentium* (cf. Santillana, *Istituzioni di Diritto Musulmano*, I.44, Shacht, *The Origins of Muhammadan Jurisprudence*, pp. 82-95 and Nallino, *Raccolta di Scritti* IV, 1942, pp. 39-40). For *communis opinio* in medieval Roman law, cf. Koschaker, *Europa und das Römische Recht*, 1947, pp. 92-93. The doctrine of *communis opinio* for the Christian church which presupposed unity in necessities and liberty in matters indifferent was formulated by Vincent of Lerins (a French theologian c. 450 C. E.) when he laid down and expressed the famous three fold test of orthodoxy, *quod ubique, quod semper, quod ab omnibus creditum est*. Cf. *Commonitorium adversus profanas omnium haereticorum novitates* cap. 2, cf. *Oxford Dictionary of the Christian Church*, New York, 1957, p. 1422.

supplied with scholars who could advise him lest he err in making decisions. שהיה מדרשו מזוין בת"ח כרי שלא יכשל בהלכה.⁵²

To determine whether a given proposal is sound according to the Halakah is no mean task. May I cite as an example the late Dean Wigmore, when he wished to offer to the learned world an adequate presentation of the Law of Evidence, he digested more than 50,000 cases in ten huge monumental volumes. Do we have comparable studies in Jewish law? Who has taken the trouble to digest the thousands of Responsa⁵³ that are concerned with the very questions that torment us? I am not for a moment minimizing the valuable contribution of the late Dr. Louis Epstein, or of the late Prof. Alfred Freiman, but they constitute a mere beginning. Should we not be as serious and assiduous in the study of our Law as the Gentiles⁵⁴ are with respect to theirs לא תהיה תורה שלמה שלנו כשיחה בטילה שלהם (Baba Batra 116a).

Secondly, the remedy must be proper so as not to offend our moral sense, or be repugnant to our feelings. There are scholars of authority who would regard קדושין על תנאי as legally valid, but highly inadvisable from other points of view.

Thirdly, the remedy for difficulties in Jewish family law must be acceptable to כנסת ישראל,⁵⁵ to the learned as well as to the laity,⁵⁶ to the pious as well as to the religiously indifferent. Especially with respect to the law involving domestic relations must we pay due homage to the Scriptural injunction that there must be one law acceptable to כלל ישראל when it commands us תורה אחת (Num. 15.16).

⁵² Ed. Albeck, p. 406.

⁵³ The responsa on the Agunah in the Geonim and Rishonim were listed by Higger in the *Otsar ha-Ḥayyim*, ed. Ehrenreich, XI. 1935, pp. 43–53 and *Horeb* vol. V, April 1935, pp. 94–107.

⁵⁴ Labeo we are told, "was exceedingly learned in the Laws and customs of the Roman people and in the Civil law . . . he looked upon nothing as lawful and accepted nothing, unless he had found it ordered and sanctioned by the old Roman law, cf. Gellius, *Noctes Atticae*, XIII.12.1.

⁵⁵ Cf. *supra*, p. 27.

⁵⁶ In Jewish law lay participation in law making is limited largely to the activity of lay judges (Sanhedrin 2b, 3a, 23a) and to *Minhag*. For English law, cf. C. S. Lobingier, *The Peoples Law or Popular Participation in Law-*

And it will be acceptable if the remedy not only looks good, but in very deed is good, as the Yerushalmi puts it (Hagigah II.2, 77 d) **מה אמרית יאיא בריוא לא אמרית אלא בעובדא**.

If I may recapitulate what I said at the beginning. A perfect divorce law has never been framed, and perhaps never will be, for perfection⁵⁷ is not of this world,⁵⁸ but a sense of realism and justice⁵⁹ should pervade the statute. Neither are they *intrinsically* incompatible with Jewish law.

In conclusion, it may not be indiscreet to recall a bit of ancient wisdom embedded in the Midrash, that the name of Moses is everlastingly associated with Israel, the Torah and its ordinances because of the huge sacrifices he made in their behalf (Exodus Rabbah 30.4) **שלושה דברים נתן משה נפשו עליהן ונקראו על שמו ישראל תורה והדינין**.

When we pursue this threefold ideal as we must, we are under the same necessity to emulate the **מסירת נפש** of our first law giver and to comply punctiliously with his injunction (Deut. 33.10) **יורו משפטיך ליעקב ותורתך לישראל**.

Thus, and only thus, will this hall of learning situated on a hill in Manhattan, share and partake **בזעיר אנפין** of some of the splendor and grandeur of the **לשכת הנוזית** located on Mount Moriah which was famous for the authentic instruction that went forth thence to Israel. **הר שממנה יצאה הוראה לישראל**.⁶⁰

Making, 1909; and F. J. Stimson, *Popular Law-Making, A Study of the Origin, History and Present Tendencies of Law Making by Statute*, 1910.

⁵⁷ The later Roman law of divorce was characterized by Rizzi as a "*lex minus quam perfecta*," cf. *Tratado de Derecho Privado Romano*, Buenos Aires, 1936, p. 194.

⁵⁸ Cf. Augustine's statement: "For the common wealth of Saints is not of this world, cf. *De Civitate Dei* XV.1. For Augustine's indebtedness to Judaism, cf. Ginzberg *J. E.* II.312-314.

⁵⁹ Cf. Exodus Rabbah 30, 15. **כשם שהזהיר הקב"ה על הדברות כך הזהיר על הדין**.

⁶⁰ Ta'anit 16a and parallels, cf. also Ginzberg, *Legends of the Jews*, V. 253, note 253 and פירושים וחידושים על הירושלמי III, 404-405.

ON RENDERING LEGAL DECISIONS*

It is my pleasant task to welcome you all on this day that we have dedicated to a discussion of the problem of Jewish Law and observance which is to be launched at this luncheon. In the name of the Committee on Jewish Law I wish to express our great satisfaction at seeing you here at this convocation, and I salute this congregation of rabbis in the hoary words of Scripture: שלום, שלום לרחוק ולקרוב, Grace be unto you who came from near and far.

According to the Mishnah *ברך על הפת פטר את הפרפרת*, if the benediction was recited over the bread, it need not be said over the hors d'oeuvres. As you are about to be regaled with a rich repast, I beg your kind indulgence for offering a few remarks that might serve as a prologue to this conference.

We are convening here at a turning point in the world's history, and in a fateful period in Israel's destiny. The ruling classes of the complacent democracies in this mauve decade have distinguished themselves by a lack of insight, of moral courage, and of unintelligent selfishness, in their treatment of the severe maladjustments in the economy of modern society. Accordingly, they have contributed in a grandiose manner, to the devaluation and debasement of human values that has precipitated the present cataclysm.

The Nazi opportunists, however, were quick to foresee the ample dividends that would accrue to the holders of a policy that he who afflicts Israel will gain supremacy, or as the rabbis put it *כל המציר לישראל נעשה ראש*. The axis powers utilizing this axiom have instigated unrelentingly a counter revolution against civilization, which they diabolically term a new world order. Consequently the woes of the Jews in a large part of the world

* An address delivered at the Conference on Jewish Law of the Rabbinical Assembly on February 19, 1941, and appeared in truncated form in *Conservative Judaism*, III (1947), no. 3, pp. 1-5.

have reached the *מדרגה התחתונה* and their situation is more precarious than ever before in their long and melancholy history. A striking parallel in ancient oriental times to Nazi brutality and savagery is depicted with matchless power by the prophet Habakkuk.

Behold, a work shall be wrought in your days,
Which ye will not believe though it be told you,
For, lo, I raise up the Chaldeans,
That bitter and impetuous nation,
That march through the breadth of the earth,
To possess dwelling-places that are not theirs,
They are terrible and dreadful
Their law and their majesty proceed from themselves.

The inspired seer supremely confident that Israel would outlive the Chaldean aggressors exclaimed: *הלא אתה מקדם ה' אלהי קדשי לא נמות*. Art not thou from everlasting, O Lord, my God, My Holy One, We shall not die (Hab. 1.12).

Neither should we despair in this year of gloom, for the Jews belong to the species that is sturdy and resilient *מפני מה נתנה* *תורה לישראל מפני שהן עוזים*. It is our faith too that our people and our traditions will persist long after the present upheaval will have become a mere historical episode, if they but cling to the traditions of the fathers, and in the words of a Maccabean writer, they have a heart to worship God and do his pleasure with hearty courage, and a willing soul, and have an open heart for his law and his statutes.

When the Committee on Jewish Law planned this conference it cherished the fond hope that it would pave the way for a synthesis and interpretation that would be meaningful for today's problems.

Now some confusion anent the function of the Committee on Law of the Rabbinical Assembly is rife in the minds of some of our colleagues, which I believe may be dissipated by a brief elucidation of its aims. For it was Bacon, who long ago, said, *Veritas saepe oritur ex errore, numquam ex confusione*. One often arrives at truth by means of error, but never by confusion.

As I see it, the Committee is charged with the task of render-

ing opinions and decisions upon questions of law and ritual submitted to it, in brief, with the formidable task of interpreting Jewish practical Law. We regard interpretation as the art of reconciling the rules of law with the realities of life and when that is impossible, then to be reconciled to the Law. Some cynics would like to believe that interpretation, like politics, is not an art but a dodge. At any event, the present practitioners of the art of interpretation are having more difficult sailing than their predecessors.

In another day, when the urge and surge of life was less keen, a knowledge of the law, plus a practical understanding of the problems were quite adequate, but in our times, the most precise analysis, with the most discriminating interpretation scarcely gratify those who chafe against the rigidities and niceties of the law, or feel crushed by its very immobility. To illustrate how different is the present situation, may I interpolate the view of a distinguished Polish scholar of the sixteenth century concerning the training a rabbi should receive in order to cope with the questions of his day. In his gloss to a chapter in the *Yoreh Deah* (242.30) which deals with the relation between teacher and disciple, Moses Isserles, summarizing the opinion of R. Joseph Kolon, remarks that the real teacher is he who taught his pupils neither casuistry nor sophistical reasoning, as was customary in that era, but rather instructed him in practical decisions, the method of arriving at them, and the true meaning of the legal statements upon which they were based. בימים אלו עיקר הרבנות אינו חלוי במי שלמדו הפלפול וחלוקים שנוהגים בהם בזמן הזה רק במי שלמדו פסק ההלכה והעיון והעמידו על האמת והיושר. The concluding words והעמידו על האמת והיושר is a paraphrase of Kolon's remark מעמיד החלמיד על פשט ההלכה על דרך האמת והיושר.¹

They who undertake to deal with the problems of Jewish Law today will do no better than emulate the high ideal set up by Rabbi Moses Isserles, but in itself it will hardly be sufficient. They will also need to be possessed of some *חכמה יתירה* in order to grapple successfully with the complicated issues in this changing world.

¹ Responsa of R. Joseph Kolon, no. 169, ed. Sudzilkov, 1834, 81b.

Let me be a bit more explicit. When we interpret law we must needs be fully cognizant of our goal, the obstacles that lie athwart our path, and the method of overcoming them, and not merely splash about without any definite philosophy. For it has been well said, *Man geht nie weiter, als wenn man nicht mehr weiss, wohin man geht*. Our goal then is the perpetuation of the Jewish tradition as it is expressed in our ritual, our law, our ethics and our philosophy to which we pledge our allegiance, and whose sovereign authority we acknowledge.

To remove the impediments that obtrude themselves upon us we must envisage the causes of the eruption in Jewish religious life which in some respects has assumed volcanic proportions. We must reckon with the great changes that have taken place in our manner of living and in our mode of thinking, which no one will gainsay. There are people whose minds have been unsettled by the historical interpretation of Judaism and are led to believe that its arguments for submitting to the law and the commandments are less cogent and persuasive than the reasoning of orthodoxy.

I believe that the criticisms lodged against the historical position can be easily dissolved. Then there are others who rebel against ritual restrictions for they regard religion, to quote Matthew Arnold, as morality touched with emotion. To these our reply is that religion without forms of ritual is comparable to a disembodied spirit. As humans, we cannot shun or transcend the body, nor hold converse with pure spirit.

To surmount our present difficulties it will be necessary more than ever to turn to the past, for example and inspiration, and to steel ourselves to meet reality with realism. We should not be so absorbed in the present as to be oblivious of the past. For history is a stream that flows right into the present. Neither should our historical pursuits be exclusively directed to the understanding of bygone times, for then we should unconsciously be confessing to an indifference to the vitality of the Jewish tradition and its relevance for us.

Hegel discussing the historical treatment of dogmas makes the following acute observation: "The strongest indication that the importance of dogmas has declined is that they are treated

principally in an historical manner and are regarded in the light of convictions which belong to others and do not concern us. While much zeal and erudition are brought to bear upon them, it is mostly about the externalities of the controversies and the passions they have once excited. Historical theologians are like clerks in a mercantile house, who have only to keep an account of the wealth of strangers, who act only for others without obtaining any property for themselves. They do indeed receive salary, but their reward is only to serve, and to register the property of others. History occupies itself with truths which were truths — namely for others, but not for those who are occupied with them. They know how a certain dogma was established, the grounds for establishing it, and how a certain opinion came to predominate. Much is told of the history of the painter of the picture, the fate, the price and the owners of the picture at different times, without even seeing anything of the picture.”²

We can derive useful suggestions from a study of our legal literature which embodies the accumulated wisdom and experience of centuries. History offers us a vantage ground from which it is possible to learn how many of the prevailing customs and practices are vital and essential. It will advise us what follies to circumvent and make us wise unto salvation. As the prudent Goethe observed:

Wer kann was Dummes
Wer was Kluges denken
Das nicht die Vorwelt schon gedacht.

Secondly, we should learn to meet reality with realism. It is as fatuous to seek counsels of perfection as it is idle to yield to wishful thinking. We must constantly keep our eye on the bit of the real world which it is our business to understand. Theory can flourish unchallenged in the temples of learning, but it meets with brusque opposition in the university of life. Somehow things hang together in thought differently than in the actual world of daily occurrences.

Many legal difficulties that vex us today could have been

² *Lectures on the Philosophy of Religion*, London, 1895, vol. I. 40–42.

obviated or at least mitigated if the rabbis of an earlier day would have been more realistic and empirical in their outlook. I am referring to such questions as autopsy, rules concerning the apostate, or the *Agunah*. Now the ancients declare that one of the ways to stimulate the development of Jewish law, is to be an *אִינו שִׂמְחָה בְּהוֹרָאָה* that is, to be dissatisfied with an unhappy decision.

I am aware that not a few of you are in an uneasy frame of mind and in an impatient mood because the Committee is slow in its attempt to recommend swifter remedies for some of the major maladjustments in our religious life. I can vouch for the fact that its hesitation is not due to inertia or indecision, but that it is caused by a caution that issues out of a deepened sense of responsibility that weighs upon it. Now it is true that the rabbis³ tell us that *הֵיטֵר נֹדְרִים פֹּרְחִים בְּאוֹרֵי וַאֲיֵן לָהֶם עַל מָה שִׁסְמְכוּ* אֲבָל חֵכֶם מַחִיר לְפִי חֲכָמָתוֹ. But the granting of absolution from vows is a minor task in comparison with the solution of staggering problems that demand all the tact and delicacy, the wit and ingenuity we can muster.

There are many who believe, if I may exploit a figure of speech from the science that deals with the distribution of worldly goods, that Jewish Law is comparable to an expanding economy, which has progressed in the course of the ages from an economy of scarcity to one of abundance, and that we are suffering from an *embarras de richesse* especially in the matter of negative precepts.

However, if we exercise restraint and patience we shall not only arrive at satisfactory solutions but we may one day discover that the bulk of American Israel that is committed to the practice of traditional Judaism may turn to our group for guidance. Explaining how it happened that the view of the school of Hillel came to prevail, the rabbis remarked⁴ *מִפְּנֵי מָה זָכוּ בֵּית הַלֵּל לִקְבוֹעַ* הֵלְכָה כְּמוֹתָן מִפְּנֵי שְׁנוּחִין וְעֻלּוּבִין הָיוּ.

The Committee, conscientious and meritorious as its efforts may be, would fall short of its aim, if it did not seek to encourage

³ Tosefta, Hagigah I.9, p. 233.

⁴ 'Erubin 13b.

a deeper interest in the study of Jewish law and ritual among the alumni. It aspires to reach this goal by different ways.

First, the convening of conferences on Jewish Law should become an annual event, designed to stimulate interest in and thought on the basic problem of the philosophy of Jewish Law. Secondly, the publication of the Jewish Law decisions would serve as a forum for the elucidation of ritual problems that arise in the various communities of this country.

Finally, we appeal to the members of the Rabbinical Assembly not to allow a day, be it ever so hectic, to pass without dedicating a part thereof, to the study of some phase of Jewish law, just as the busy but scrupulous physician,⁵ despite his days with bustling patients, manages to keep abreast of the latest discoveries in medicine. While the mastery of the whole domain of Jewish Law is a full time job even for the most gifted and assiduous person, a general familiarity with Jewish law, ritual and ceremonies as far as they are related to the contemporary scene is attainable by due application.

I shall forebear to marshal the reasons for the decline of the study of the halakah in the American rabbinate, as they are well known to you, but I believe the time is ripe to transcend these causes and to return to the traditional ideal, according to which, the rabbi rendered homage to Jewish learning by setting aside time for study: קובע עתים לחזרה.

⁵ The saying of the Rabbis טוב שברופאים לזרזם (Kiddushin, end and parallels) reflects their views on the callous and incompetent doctors of their day. Similarly, Martial (*Epigrams* I.47) writes "*Nuper erat medicus, nunc est vispillo Diaulus: Quod vispillo facit, fecerat et medicus.*"

Lately was Diaulus a doctor, now he is an undertaker,
What the undertaker now does the doctor too did before.

Pliny remarks that the physicians are the only ones who kill with impunity (*Nat. Hist.* 29.18). For other references to the irresponsibility of physicians in classical times, cf. S. Reinach, in Daremberg and Saglio, *s. v. Medicus*, p. 1676b. The phrase רפאים בל יקמו was translated by the Septuagint as οὐδὲλ ταρποὺ οὐ μὴ ἀναστήσουσιν (Isa. 26.14) which Preuss misunderstood to mean that the physicians will not arise at the resurrection, cf. *Biblischtalmudische Medizin*, p. 25. For a correct interpretation of this passage, cf. Seeligmann, *The Septuagint Version of Isaiah*, 1948, p. 72.

Nothing else would raise the prestige and increase the authority of the rabbi in the community, for in the ultimate analysis, it is to him that they apply for direction in all matters of ritual and religious observance.

Secondly, with a more profound understanding of Jewish ceremonials and law, the rabbi will be in a better position to repel the intrusion of non-Jewish customs, in the services and in the home, that constantly occur as a result of avowedly alien influences. Thus and only thus, will the rabbi and the congregation be worthy of each other⁶ כדאי השליח למי שנשתלח אצלו וכדאי מי שנשתלח אצלו לשליח.

⁶ Sifra, end.

SABBATH PROHIBITIONS KNOWN AS *SHEBUT**

הדרן על סיום הש"ס

While it is customary to pronounce orally the *Hadran* that marks the climax of the study of the Talmud, דברים שבעל פה אי, *אתה רשאי לאמרם בכתב* you will suffer me, gentlemen, to read my discourse. The only apology I can offer is a longing for the rabbinic beatitude *לכאן ותלמודו בידו* אשרי מי שבא לכאן which I find very expedient to take literally, although it has been said: "All things are permitted unto me, but all things are not expedient."

When I was approached by your chairman to participate in this סיום הגדול I felt somewhat diffident. I was perplexed at first as to the choice of an appropriate theme for such a critical and fastidious audience as this one.

I was inclined to consider a סוגיא in זבחים because many engaging problems obtruded themselves upon my attention when I had perused this treatise last year in the course of my studies. According to a well-founded tradition in my family, I am a lineal descendant of Aaron the High Priest, (יודע אני בעצמי שאני כהן) and consequently a personal and perennial interest in this branch of study is excusable. Unfortunately, my pedigree disqualifies me from dealing with this topic dispassionately, as the Talmud observes anent some illustrious Kohanim of that day. ר' ישמעאל (Hullin 149a)³ רב כהנא מסייע כהני and (Erubin 105a) כהנא מסייע כהני and elsewhere it is said: *הכהנים דורשין מקרא זה לעצמן*: (Shekalim I.4).

Bearing always in mind the Scriptural injunction דבר בעתו מה

* Delivered at the Rabbinical Assembly Convention, June 25, 1945, and printed in the *Proceedings of the Rabbinical Assembly*, IX (1949), 123-161.

¹ Gittin 60b.

² Pesahim 50a.

³ Cf. also the comment of R. Kahana 'Erubin 8b, הואיל ושמעתתא דכהני היא, אימא בה מילתא, cf. also Josephus, *Contra Apionem*, I, p. 54. Being a priest and of priestly ancestry I am well versed in the philosophy of those writings.

טוב I am sensitive to the fact that in this time, which is so critical for our people, it would not be chivalrous to justify indulgence in issues remote from the spiritual challenges of our day and age.

As I was pondering over a timely topic, it occurred to me that discretion, which is the better part of valor, would suggest a subject which would win the approbation of this congregation of spiritual leaders, composed as it is of men who combine the profession of practical rabbinics with the pursuit of scholastic ideals.

Commenting upon a verse in Genesis (36.20) "These are the sons of Seir, the Horite, the inhabitants of the land," R. Yoḥanan observes: Were then all the other peoples dwelling in heaven?" Rather Scripture means to imply that these aborigines were such experts in horticulture, that they recognized what soil was fit for olives, grapes or figs by merely tasting or smelling a clod of earth (Shabbat 85a).^{3a} א"ר שמואל ב"ר נחמני א"ר יוחנן מאי דכתיב אלה בני שעיר החורי יושבי הארץ אטו כולא עלמא יושבי רקיע נינהו אלא שהיו בקיאים בישובה של ארץ שהיו אומרים מלא קנה זה לזית מלא קנה זה לגפנים מלא קנה זה לתאנים. וחורי שמריחים את הארץ. וחוי אמר רב פפא שהיו טועמין את הארץ כחויא.

Similarly, you who are concerned with the cultivation in this land, of the Torah which has often been compared to olives, figs, and grapes,⁴ know full well the nature of the American soil, and the character of בני ישראל. I fancy you will all subscribe to the proposition that one of our most baffling problems with respect to the cultivation of Judaism in this free hemisphere is the tending of the hoary tree, known as the Sabbath, with its massive branches, luxuriant foliage, and variegated fruit, in a soil somewhat sterile and barren. Consequently, I resolved to allow

^{3a} Cf. also Genesis Rabbah 26.7, Kutscher, בארמית הגלילית, Jerusalem, 1952, p. 45, note 106, and Patai, *Metsudah*, V-VI (1948), 332.

⁴ With regard to olives we read: יצחק אלו חלמידי אלה שני בני היצור אמר ר' יצחק אלו חלמידי חכמים שבארץ ישראל שנוחין זה לזה כשמן זית למא נמשלה דברי תורה כחאנה מה חאנה זו, R. Yoḥanan, Sanhedrin 24a. With reference to figs there is the statement of R. Yoḥanan, כל זמן שאדם ממשש בה מוצא בה חאנים אף דברי תורה כל זמן שאדם הוגה בה מוצא בה חכמים, 'Erubin 54b. For grapes, Targum to Cant. 1.11 on הפריחה הגפן has דמחילין לגופא.

Secondly, I was in a dilemma as to the fashion of developing this theme. The *Hadran* by its very essence and nature, requires a sophisticated and flamboyant approach. One of its main tasks is to make manifest the well-rounded unity of the entire body of traditional lore which assimilates the circumference of a circle⁵ in which the beginning and the end coalesce at any given point.

ועל זה הדרך שמעתי שם Tob Melamed ^s Cf. the striking observation of Shem Tob Melamed אומרים שהתורה האלהית היא כדמות עגולה וסוף התורה שהוא פסוק ולכל האותות והמופתים cf. אשר עשה משה ונו' כי מציאות האמנת האותות והמופתים מורה על אמנת חדוש העולם Venice, 1596, 3a. The whole Torah, we are told, forms a unit כתר שם טוב cf. Tosefta, Sanhedrin VII.7, p. 426. שכל התורה כולה ענין אחד

⁷ Cf. Nahmanides' remarks about him who confuses two rules of law דינא דגרמי in his essay, Constantinople, 1520, 4b, and *Be'er Heteib* to *Hoshen Mishpat*, 386, note 1. Rabbi Ch. Heller called my attention to שו"ת חתם סופר I.51 who also terms the mixing of different laws as כלאים. Cf. also המערב ספרי הוי"ן עם דברי תורה עובר על חורש בכלאים, quoted by Baruch Epstein in *מקור ברור*, Vilna, 1928, III, p. 1609.

21a). Similarly חמור is the symbol of the student packed with a cargo of knowledge. As we read in the Midrash (Genesis Rabbah 99) in connection with the blessing of Issachar as a חמור גרם that כשם שהחמור טוען את המשא כך ישכר טוען את התורה. Just as the ass bears well his heavy burdens, so does Issachar carry his massive learning.^{7a}

With regard to the second sentence ובגר כלאים שעמנו לא יעלה (Lev. 19.19) it can be shown that בגר is a symbolical expression for absorption in rabbinics. For did not the sages remark on the Isaianic stanza ואין לחם ואין שמלה (Hagigah 14a). Should you demur that the גזירה שוה is invalid, for Leviticus uses the term בגר and Isaiah שמלה then let me remind you that the rabbis avail themselves of a similar argument when they drew an analogy between ושב הכהן and ובה הכהן which are two unlike phrases, yet it was defended upon the grounds זו היא שיבה זו היא ביאה (Menahot 4a and parallels) and elsewhere we say הכאה הכאה גמרינן (Baba Kamma 83b).⁸

If you find my reasoning untenable because I adduced two texts in order to score a point in defiance of the hermeneutical principle שני כתובים הבאים כאחד אין מלמדין (Kiddushin 24a) then my rebuttal is that both of these are necessary, צריכי as the Talmud would say. The first stresses the importance of being conversant in Scriptures מקרא the second dwells upon the significance of immersion in Talmudics, משנה וחלמוד.

While I have advanced ample evidence to the effect that the mixture of incompatible methods in the pursuit of Torah is Biblically banned, I have as yet to vindicate the repudiation of the traditional point of departure. Does not the Talmud apprise us that the system of Pilpul was vouchsafed to Moses on Sinai as a special gift, which he generously transmitted to Israel (Nedarim 38a).⁹ Did not the knowledge of seventeen

^{7a} For the ass as a symbol of toil, cf. Philo, *Sacrifice of Cain and Abel*, 34.112.

⁸ Cf. also Yebamot 48a, נאמרה עשייה בראש ונאמרה עשייה בצפרנים, where the analogy is based on ונלחה את ראשה ועשתה את צפרניה and ונלחה את ראשה ועשתה את צפרניה.

⁹ Cf. the remark of Israel Isser b. Zeeb Wolf in the introduction to his קובץ חרי בפלפולא, Königsberg, 1860, שער המשפט.

hundred סופרים disappear during the period of mourning for Moses, which Othniel ben Kenaz restored by means of his dialectical reasoning, עתניאל, אף על פי כן החזירן? בן קנו מחוך פלפול?

Was not the illustrious R. Ḥanina proud of his proficiency in casuistic skill as we read: 'דכי הוו מינצי ר' חנינא ורבי חייא א"ל ר' חנינה לר' חייא בהרי ידי מינצת דאם ח'ו נשתכחה תורה מישראל מהדרנא? ליה מפלפול?

When R. Ḥanina was once challenged by R. Ḥiyya¹⁰ on a rule of Law, R. Ḥanina exclaimed: Do you dispute my opinion? If, God forbid, the Torah should fall into oblivion, I could restore its leading ideas by the sheer force of subtle analysis (Ketubot 103b).

When Resh Lakish failed to locate the tomb of R. Ḥiyya when he was marking the graves of scholars, he was overcome by a melancholy feeling that he was inferior to R. Ḥiyya in learning, in spite of his own great logical acumen, which led him to give vent to the statement: רבונו של עולם לא פלפלתי תורה כמוהו: יצתה בת קול ואמרה לו תורה כמותן פלפלת תורה כמוהו לא רבצת (Baba Metsia 85b).

Lord of the Universe, did I not betray such keen penetration in the study of the Law as R. Ḥiyya? Whereupon a Heavenly Voice responded: Yes, you did, but you were not as active in the dissemination of Jewish learning as R. Ḥiyya.

Is it not a fact that R. Sheshet used to tremble when he listened to the Pilpul of R. Ḥisdah? רב ששח מרתע כוליה גופיה מפלפוליה (Erubin 62a). Are not trenchant and pungent discussions with sharp students פלפול החלמידים one of the forty-eight modes of attaining to the knowledge of Torah?

Did not Raba with an eye on the future inform us that at the final judgment man will be required to prove that he has wisely indulged in ingenious disputation, פלפלת בחכמה (Shabbat 31a).¹¹

¹⁰ Cf. Hullin 110a, where the פלפולו של ר' חייא is spoken of. In Y. Ma'aser Sheni I.1 the expression מפני פלפולו is used to denote the Amoraic interpretation of the first passage of the Mishnah of that treatise. On פלפול חבריא, cf. Y. Terumot IV, 42d, and Bacher, *M. G. W. J.*, 1899, p. 350, note 1.

¹¹ R. Samuel Edels in his comments upon this passage remarks: דהיינו שלא יהא אדם מפלפל פלפול של הבל אלא שיהא כוונתו לפלפל בשכל וחכמה ודעת, cf. also

Philo (*De Vita Mosii* II. 212): "And the wisdom must not be that of the systems hatched by the wordcatchers and sophists . . . but the true philosophy which is woven from three strands — thoughts, words, and deeds." Rashi, commenting on Ps. 119.97 כלל חכמה ראיתי קץ, observes, ולפלפל בה לסלסל ומפלפל בהם. Similarly upon Ps. 119.141 פקדון לא שכחתי Rashi adds, ולפלפל בהם. As for the term סלסול as applied to the study of the Torah, cf. Rashi's remark on ותרומם, Prov. 4.8, חפשה היה חזר עליה לדקדק בה, and in Megillah 18a, where this verse is cited, he says, להפליג לשון חפוש והפוך. R. Ephraim Zalman Margolioth suggested that Rashi's remark on Ps. 119.97 was originally found to Ps. 119.87, ואני לא עזבתי פקודיך, and that its present position is due to a scribal error, cf. the introduction to his Responsa אורח חיים on בית אפרים, Warsaw, 1883, 1d-2a. In a MS. of the Jewish Theological Seminary of America (H 432 of the 17th century) the passages are found as in our printed texts, whereas in manuscript MS 778 (14th century) it is omitted in both places. It is noteworthy that R. Nissim in his commentary on the Alfasi on Shabbat (beg.) cites in full, the view of the Tosafot, Shabbat 3a, s. v. בלא כל זה פלפלו בחוספות וכתבתיו להחלם בו, which he rejects in the following terms: מן אברהם writes that the rule prohibiting one from beginning to study at the time of חמץ does not apply to one who is giving a שיעור in the synagogue, and he goes on to say אבל אסור לעסוק בלא פלפול אלא פלפול דבר הלכה, and he goes on to say אבל אסור לעסוק בפלפול אפילו אינו בביתו דבזה ודאי איכה למיגר דילמה ממסכא ליה שמעתתא ואתא לאימונעי. Cf. *Orah Hayyim* 431.5; with regard to Pilpul in general, cf. Lauterbach in the Jewish Encyclopedia X, pp. 39-43. To the literature cited there add the following: Atlas, האסיף, III, 1886, pp. 377-379; Moses Reines, כנסת ישראל, III, 1888, pp. 137-172; Weiss, דור דור ודורשיו, vol. V, 1891, see index, s. v. פלפול; Fishman, הנותן בים דרך, Berdichev, 1902; Ehrentreu, *J. J. L. G.*, III, 1905, pp. 206-19. Joseph Badad (חוסופאי) in the XIX, 1908, pp. 138-146, 248-258, 329-335. Baruch Epstein, מקור ברוך, Introductory volume, Vilna, 1928, pp. 588-598. S. Greenspan, פלפולו של חזרה, London, 1935. Amiel, ספר המדות, לחקר ההלכה, vol. I, 1939, cf. review by Glickberg in העולם, vol. 28, no. 1, pp. 7-8. Assaf, בישראל, מקורות לחולדות ההיגיון, Jerusalem-Tel Aviv, 1925-1943, see index, s. v. פלפול and חלוק.

¹² Noteworthy are the remarks of R. Moses Almosnino on the nature of the Pilpulistic mind. Commenting upon the verse in Eccl. 10.1, יקר מחכמה מכבוד, כי יחזק השכל מאד כאשר יהיה שם סכלות מעט ויעמיק בהשכלתו, סכלות מעט מה שלא יעשה אותו בשיהיה השכל ישר מאד כי לא יעמיק הרבה . . . ועל זה מצאנו ראינו הישרים מאד בעיונם אינם מפולפלים וכאומרם לפום חורפא שבשפתא, cf. ידי משה, Venice.

Should there be in your midst some unconvinced devotees of the Babli who will urge that טבא חדא פלפלא חריפתא ממלי צני קרי (Megillah 7a), then I shall be compelled to cite again the Yerushalmi (*loc. cit.*) לעולם להיות בלא פלפלין אי אפשר לעולם להיות (Soferim XV.8) it is stated that נמשלה בלא מלח and elsewhere (Tורה כמלח).

About one hundred and twenty-five years ago, the famous Romanist, Anton F. J. Thibaut,^{12a} who lectured on Roman Law at Heidelberg, made the following pointed observation: "It is of little use that good ideas are securely locked up in printed books. What is important is that a living law should dwell in the minds of judges and lawyers, who have acquired a comprehensive knowledge of the law."¹³

Taking this bit of advice as my cue, I shall dwell for a while upon an aspect of living Jewish Law which I know is on your mind, and I shall endeavor to present as comprehensive a view thereof, as the brief time at my disposal will allow. My topic is none other than the ancient doctrine of *Shebut* first mentioned by Moses.¹⁴ When the famed lawgiver ascended the empyrean to receive the Torah, the angelic beings voiced in no uncertain terms their opposition to man's acquisition of the divine gift. Whereupon Moses expostulated with the celestials כלום אתם שבות עושים מלאכה שאחם צריכים שבות (Shabbat 89a). And in much later

1570, 233a. R. Aryeh Leib Cohen ascribes the necessity of Pilpul to the retrogression of the intellect: הקדמונים ביושר שכלם האמיתי לא היו צריכים כל כך עומק הפלפול כאשר אנחנו פה היום . . . צריכים זמן זמנים להבין סברה אחת מקדמונו ז"ל ולזה צריך פלפול רב, cf. *Sefer ha-Mitsvot*, ed. Lemberg, 1857, Introduction, 2a, cf. also Meiri, *Horayot*, end, ed. Schreiber, p. 173.

^{12a} The teacher of Eduard Gans (1798–1839), an early Jewish Romanist, cf. *J. Q. R.*, N. S., 34, p. 275.

¹³ Cf. *The Continental Legal History Series*, Boston, 1912, Vol. I, p. 442.

¹⁴ The *Shema* to Rosh Hashanah IV.1 ascribes to the Semag the view that איסור הזאה which is שבות משום actually goes back to Moses. Similarly, the *Shema* to Y. 'Erubin end. But in Semag, מצות עשה 224, where the topic is dealt with, I found no such statement, cf. also gloss of Chajes to Shabbat 30a, and Wolf Leiter in *Ma'orot*, Pietrkov, 1936, no. 121. Nahmanides remarked that שבות דרשבה בימי עזרא וביה דינו חקנו, cf. *Sefer ha-Mitsvot*, ed. Warsaw, 1883, p. 54 and Chajes' comment upon the statement of Rashi במנין שבות נזרה, Shabbat 3b.

times, R. Johanan cautioned against disparagement of *Shebut* as a subject of scientific investigation when he said: **אל תהא שבות קלה בעיניך שהרי סמיכה אינה אלא משום שבות ונחלקו בה גדולי הדור** (Hagigah 16b).¹⁵ It seems that R. Johanan's advice was not given in vain, for even during the last two centuries more than two score of Talmudists were stimulated to wrestle with this theme, albeit in a casuistic strain.

The nature and essence of *Shebut* as disclosed by a rapid review of its Biblical roots, its Tannaitic formulations, its Amoraic ramifications, and its post-Talmudic repercussions, will be the express purpose and principal burden of this discourse.¹⁶

In Scripture, the prohibition of work on the Sabbath and festivals, is usually accompanied by the positive precept to rest upon the day **השבות**¹⁷ and **ישבת שבתון**¹⁸ from which it is crystal clear that not only was manual labor, like ploughing and reaping, cooking, baking, and kindling fire forbidden, but even minor physical exertions, such as leaving one's place **איש ממקומו** **אל יצא** were proscribed as incompatible with a strict Sabbathical repose. The Tannaim were quick to discern the twofold

¹⁵ Cf. also Y. Hagigah II.2.

¹⁶ It need scarcely be mentioned that the problem is being dealt with here in a cursory manner, and that only a few highlights are being stressed. An exhaustive historical treatment of this fascinating topic would illuminate a number of halakic points, and would constitute a valuable monograph.

¹⁷ Ex. 23.12 and 34.21. While the Tannaim do not attach the doctrine of *Shebut* to this verse, Maimonides (XXI.5) does. **נאמר בחורה חשבות אפילו**. מדברים שאינם מלאכה חייב לשבות מהן, cf. Perla, ספר המצות לר' סעדיה גאון, I.376 ff., II.393 ff., and Tosafot, Shabbat 69a, s. v. דידע.

¹⁸ This phrase is used with regard to the Sabbath in Ex. 16.23; 31.15, 35.2 and Lev. 23.3; with reference to the Day of Atonement, in Lev. 16.31 and 23.32. With regard to the New Year, in Lev. 23.24 and with regard to the Feast of Tabernacles, in Lev. 23.39. Rashi to Yoma 74a, s. v. שבתון writes: **כי היכי דשבתון האמור בשבת אסמכו ביה רבנן שאר מלאכות שלא היו במשכן ואינה מלאכה גמורה הכי נמי שבתון דנבי עיניו . . . להוסיף על עיניו אכילה**.

¹⁹ Cf. the comments of Isaac Pulgar in עור הדת, edited by George S. Belasco, London, 1906, p. 25. With respect to this verse, R. Meshullam ben Kalonymos, in his polemics with the Karaites, tries to prove that it is permitted to leave one's home on the Sabbath, cf. Semag, Negative precept 66, ed. Kopyes, 12d. Note also the remarks in the Introduction to the Zohar, 5b שבתתי 5b ואת שבתתי (Lev. 19.2) לאסנאה תחום שבת דאיהו חרין אלפין אמין לכל סטרא (חשמו

character of the Sabbath observance, and realized, as Nahmanides has so convincingly demonstrated, that even a punctilious absention from all the prohibited works on the Sabbath, would not in itself preserve the spirit of the Sabbath,²⁰ the essence of which was מנוחה.^{20a} Hence the Tannaim were constrained to specify what activities were inconsistent with the Sabbath rest²¹ but they neglected to define the principles underlying their restrictions.

The Tannaim, like the classical Roman jurists, were disinclined to formulate rules in the abstract, because they intuitively felt the perils of excessive abstraction since it is impossible to foresee all the complications of human action which the future will unroll. The observation of the Roman jurisconsult Javolenus: "Every definition in civil law is dangerous, *Omnis definitio in iure civili periculosa est*,"²² (*Digest* L.17. 202) applies with equal force to religious law!

Nevertheless, a glance at the Biblical verses to which the Tannaim resorted as a basis for their interpretations, and a logical analysis of the acts comprehended in the category of *Shebut* will enable us to disentangle at least three distinct motivating conceptions. First, and probably oldest in the point of time, are those activities which by no stretch of the imagination can be designated as labors, but which are disallowed as being out of harmony with relaxation on the Sabbath. These

²⁰ Cf. Celsus, *Digest*, I.3, 17: *Scire leges non hoc est verba earum tenere sed vim ac potestatem*.

^{20a} As was already noticed by Rashi who observed מנוחה חסר מנוחה מה היה העולם חסר מנוחה שבת באחה שבת באחה מנוחה, cf. Megillah 9a, s. v. ויכל and Tosafot, Sanhedrin 38a, s. v. חצבה, cf. R. Joseph Rosin, צפנת פנח on *Hilkot Shabbat*, 21.1.

²¹ Cf. Maimonides (XXIV.12) who observes that certain acts were prohibited because they were inconsistent with the verse למען ינוח (XXIV.12) and a שביחה הניכרה (XXIV.13), cf. also *Hilkot Yom Tob*, I.17. R. Joseph Rosin remarks that כל גודרי השבוחין לגבי שבת נאמרו אז אך לא בגדר דין רק בגדר מנוחה כללית, cf. צפנת פנח, 2nd ed., Dvinsk, 1920, 81b.

²² Cf. also *Digest*, XXII.1, 32. *Difficilis est huius rei definitio* (with regard to default (*mora*)). Cf. also Jhering, *Geist des Römischen Rechts*, Leipzig, I, 1878 (4th ed.), p. 43, and Schulz, *Principles of Roman Law*, Oxford, 1936, p. 41. On definitio, cf. also Pringsheim in *Festschrift für Lenel*, pp. 251 ff., and Himmelschein in *Symbolae Friburgenses in honorem Ottonis Lenel*, pp. 420-421.

Thus in the Sifra on the verse (Lev. 16.30)²⁷ וכל מלאכה לא אין לי אלא מלאכה שחייבים על מינה כרת מלאכה חשבו we read שאין חייבים על מינה כרת מנין שלא יעלה באיל²⁸ ושלא ירכב על גבי

²⁸ Cf. also M. Sukkah II.2, and Tosefta, 'Erubin III (II), 13, p. 141, where it is said *מבעור באילן ולא יעלה באילן ואין נחלין באילן ואין נסמכין באילן ואין עולין באילן ואין נסמכין באילן ואין נחלין באילן ואין עולין באילן*. In Y. 'Erubin III.3 we read with regard to an Erub on a tree less than ten *טפחים* from the ground that *על לעבור* ראי הוא *השבות*, which the *משה פני משה* explains *שבוט שבוט*, cf. also

בהמה²⁹ ולא ישוט על המים ולא יספוק ולא יטפיה³⁰ ולא ירקד תלמוד לומר שבתון שבות אין לי אלא שביחת רשות שביחת מצוה מנין לא יקדיש³¹ . . . ולא יתרום ולא יעשר ולא יקדיש³² ולא יגרש . . . תלמוד לומר שבתון שבות³³

The number of acts which fall into the category of *Shebut* vary in different sources. In the Sifra 18, in M. Betsah 14 and in the Mekilta diR. Shimon, ten are enumerated. En passant it should be noted that Philo already was familiar with the rule forbidding the judging of lawsuits on the Sabbath.³³

Rashi to 'Erubin 32b, s. v. והוא משחמש באילן, and 63a, s. v. בצינתא and 100a, s. v. שמע מינה and Hagigah 16b, s. v. דהדי כימי.

²⁹ R. Aḥa b. Jacob (Y. Betsah V.2) prohibited riding on an animal on the Sabbath because of Ex. 23.12. However, according to Y. Hagigah II.2 (78a), it is prohibited as a *Shebut*, and is not a capital offense in normal times. The Mekilta found in this verse the permission for an animal to pluck grass from the soil on the Sabbath. למען ינוח שורך וחמורך הוסיף לו הכתוב נייח אחד להיות. אחה אומר לכך בא או אינו אלא יחבשנו בחוך ביתו. אמרת אין זה חולש מן הקרקע ואוכל. נייח אלא צער ח'ל למען ינוח הוסיף לו הכתוב נייח אחד להיות חולש מן הקרקע ואוכל, ed. Horowitz, p. 331, cf. also Tosafot, Shabbat 122a, s. v. מעמיד, cf. also ראבי"ה on שבת, p. 338. Here נייח is taken in the sense of being at ease on the Sabbath, cf. the remarks of the מהרש"א to Rosh Hashanah 18a on the passage כנגד נייחא in Lev. 23.24 is rendered by נייחא in Targum Onkelos, whereas the Targum Yerushalmi has ימא טבא, cf. also F. Rosenthal, *H. U. C. A.*, XVIII, p. 158, note 3. On *bonus dies* in the *Vetus Latina*, cf. Blondheim, *Les Parlers Judéo-Romans*, Paris, 1925, p. LXI. Note also the statement שביחתו על מצוה אחת חמור, Shabbat 153a, and Maimonides, שבת, XX.6.

³⁰ Isserlein remarked that it is permitted to snap one's finger on the Sabbath to amuse children, and it is no violation of *Shebut*, cf., *Terumat ha-Deshen*, no. 62.

³¹ Cf. Tosafot, Mo'ed Katan 27b, s. v. אבל.

³² When the eve of the Passover occurred on the Sabbath, it was customary to sanctify the Paschal lamb in the עזרה; Pesahim 66b and Shabbat 148b; R. Shimi explains that it is משום שבות שהחירו במקדש (Y. Pesahim VIII.2) whereas in the Babli the reason given is that it is חובה שקבוע להם זמן, cf. also Tosafot, Hagigah 8a, s. v. משום.

³³ Cf. Responsa of Moses Isserles, no. 125 and יעקב, III.67.

³⁴ Constantine in 321 C. E. enacted that all courts of justice rest on Sunday, *Code of Justinian*, III, 12.2. *Omnes iudices urbanaeque plebes et artium officia cunctarum venerabili die solis quiescant*. Cf. also A. H. Lewis, *A Critical History of Sunday Legislation*, New York, 1888, pp. 18 ff.

Among the Assyrians and Babylonians it was prohibited on the seventh day to the king to ascend his chariot, or to pass a sentence, and to the oracular

Secondly, a concept was current in some Tannaitic circles, according to which certain works not included in the *לִים מלאכות* as well as other labors, when performed in an irregular manner (כלאחר יד) were considered to fall into the class of *Shebut*. These two species can plausibly be connected with two Midrashic interpretations in the Mekilta diR. Shimon. Commenting upon the verse in Ex. 12.16 *הם לא יעשה בהם כל מלאכה* the Mekilta observes: אין לי אלא מלאכה שחייבין על מינה חטאת מלאכה שאין חייבין על מינה. חטאת מנין לא עולין באילן וגו'. תלמוד לומר מלאכה כל מלאכה. Since Scripture might have written *הם לא יעשה בהם כל מלאכה* but chose to add the adjective *כל* which is superfluous, it thereby indicated that certain *מלאכות* are prohibited *משום שבות*. However, the illustrations given by the Mekilta *ad loc.* are not in consonance with the interpretation based upon *מלאכה*.

In another passage in the Mekilta diR. Shimon interpreting the verse *ששת ימים תעשה מלאכה* (Ex. 35.2), the Rabbis remark:

priest to issue a decision in the adytum, cf. E. Schrader, *Die Keilinschriften und das alte Testament*, 3rd ed., by H. Zimmern and H. Winckler, Berlin, 1903, p. 593.

For Philo's view, cf. Ritter, *Philo und die Halacha*, Leipzig, 1879, p. 130. Josephus reports that the Emperor Augustus issued an order that the Jews may not be compelled to go to a court of law on the Sabbath (*Antiquities* 16.6.2 and 4, cf. also Schürer, *Geschichte des Jüdischen Volkes*, III, 3rd ed., 1898, p. 71, note 44).

Goldziher called attention to the fact that a Muslim Kadi of the ninth century was accustomed to impose an oath upon the Jews on the Sabbath and on Christians on Sunday because he knew they would not swear falsely on that day, cf. *R. E. J.*, 45 (1902), p. 7. Note also the remark of the rabbis that an 'Am ha-Arets will not lie on the Sabbath, concerning the tithes *אימא אמת* (Y. Demai IV.1). According to a law issued by Honorius and Theodosius in 418, it was prohibited to compel a Jew to appear in court on the Sabbath or any religious holiday, *Code of Justinian*, I, 9, 13, cf. also E. Westermarck, *Christianity and Morals*, London, 1939, p. 90, note 7, and p. 92, note 6. For the days in the Roman calendar when it was prohibited to issue judgments, cf. Girard, *Histoire de l'organisation Judiciaire des Romains*, Paris, 1901, p. 18, note 2, and the remark of Cicero, *Feriis iurgia amovento*, in *De Legibus*, II.8, 19, Loeb classics edition, p. 392. In early colonial times Jewish sensibilities were recognized to the extent that a Jew summoned on the Sabbath did not have to appear in court, cf. A. V. Goodman, *American Overture Jewish Rights in Colonial Times*, Philadelphia, 1947, p. 214, note 80.

אין לי אלא מלאכות ותולדות שהן אסורין מניין לאסור שבות ת"ל כל מלאכה יכול יהו חייבין חטאת על איסור שבות ת"ל מלאכה מלאכה המיוחדת חייבין מלאכה. עליה ואין חייבין על איסור שבות. While this statement concurs with the previous in deriving *Shebut* from the superfluous word כל in מלאכה, כל, this Mekilta furnishes us with a valuable clue as to its concept of *Shebut* by stating that *Shebut* is clearly distinguished from מלאכה המיוחדת. Now what does מלאכה המיוחדת mean? It signifies a work specified by Scripture, i. e., one of the מלאכות ל"ט. Accordingly, *Shebut* is a type of work not included in the ל"ט מלאכות. For the use of the term מיוחדת in this sense, let me cite from the Mekilta diR. Shimon (p. 166) the following statement מה הבערה מיוחדת אחת מל"ט מלאכות וחייבין עליה בפני עצמה אף שאר ל"ט מלאכות יהא חייב על כל אחת ואחת בפני עצמה. Noteworthy is that R. Nissim (Shabbat 13a) was also familiar with the phrase ל"ט מלאכות as a designation for the מלאכות מיוחדות.

Now according to this school of thought which holds that *Shebut* embraces labors that do not form part of the ל"ט מלאכות, what activities are prohibited שבות משום? The Mekilta lists ten enterprises including purchase and sale,³⁴ transaction of loans and deposits, business calculations, the conducting of judicial proceedings, the making of pleas and the bringing of accusations. Interestingly enough, Philo³⁵ too, remarks that the bringing of accusations, the demanding of the restoration of a deposit, and exacting repayment of a debt are prohibited on the Sabbath (*Migration of Abraham*, 16).

However, if we turn to the Mishnah and the Baraitot, we shall find about fifteen other examples of this type of *Shebut*. Thus in the Mishnah, the act of cutting is enumerated twice in the list of the ל"ט מלאכות, first with regard to reaping grain קוצר and secondly with respect to cutting leather המחטכו. But there are other prohibited acts of cutting which the Tannaim for one

³⁴ Rashi (Betsah 37a, s. v. משום) gives two reasons for the rule לא מקדישים etc., first because it resembles sale and המקרא דכתיב ממנו חפצך (Isa. 58.13), cf. also Tertullian, *Against Marcion*, IV.12, secondly because he might forget and write. Similarly, Maimonides, שבה XXIII.12-13, 15, writes נזרה שלא יכתוב. However, Rashi (Betsah 27b, s. v. פוסקים דמים) writes דמקח וממכר בשבת וי"ט אסור בספר עזרא (Neh. 13.14, 19).

³⁵ Cf. B. Ritter, *Philo und die Halacha*, Leipzig, 1879, p. 130.

reason or another did not classify with either of these two אבות מלאכות or their תולדות, and accordingly, designated them as *Shebut*. Thus in connection with the Shofar we read: שופר של ר"ה אין חותכין אותו בין בדבר שהוא משום שבות ובין בדבר שהוא משום לא רעה (Rosh Hashanah IV.8). One may not cut a Shofar, neither in the manner that involves a transgression of the rule of *Shebut* nor of a negative precept. According to the Talmud, the text means that the Shofar may not be cut by a scythe, although that is an irregular way of cutting (כלאחר יד); hence it is prohibited משום שבות.

According to a Baraita quoted by R. Mana,³⁶ the trimming of vegetables³⁷ on the Day of Atonement that occurs on the Sabbath is an act of *Shebut* as we read שחל להיות בשבת מנין ליום כפורים (Shabbat 114b).³⁸ If a man

³⁶ The Munich MS. reads R. Huna, whereas the Oxford MS. has רבא, cf. דקדוקי סופרים, *ad loc.* Cf. also Kasher, *Talpiyot*, III, 1948, p. 480, cf. also the statement in the name of R. Mana in Y. Pesahim IV.4, אם אומר את כן אף, מתבייש ולא מקנב ומצא בא לידי סכנה.

³⁷ Rashi explains קניבת ירק as לקח העלין מן הקלחין. However, Nahmanides, Ibn Adret, Meiri, R. Nissim, take קניבת ירק to mean הדחת ירק (cf. also מנין ליום הכפורים שחל להיות בשבת 1.3 and Elijah Vilna to *Orah Hayyim* 611, notes 3-4).

³⁸ In the Talmud, *loc. cit.*, there is a Baraita supporting R. Johanan who maintains just the opposite view. However, there is a reading (cf. דקדוקי סופרים *ad loc.*) according to which R. Johanan refers to שחל להיות בשבת, whereas R. Mana refers to שחל להיות בשבת. This reading was known to Maimonides (cf. שביחא עשור, I.3) and Meiri. In the Tannaitic Midrashim too קניבת ירק is permitted. Thus we read in the Sifra (ed. Weiss, 83a) וכל מלאכה לא תעשו יכול לא יקנב את הירק ולא יציע את המטות ולא ידיח את הכוסות ודין הוא נאמר כאן מלאכה ונאמר במלאכה המשכן מה מלאכה האמורה במלאכה המשכן שיש עמה חשובה אף מלאכה האמורה כאן שיש עמה חשובה. In the Mekilta diR. Simon p. 16 and p. 108 the reading is שיש עמה מחשבה. The לקח טוב has מלאכה חשובה, cf. also the phrase מלאכה מחשבת אסרה חורה (Betsah 13b). Rashi also uses the phrase מלאכה חשובה in this sense, cf. Shabbat 70a, s. v. כאן; cf. Tosafot, Shabbat 49b, s. v. Note also Baba Kamma 2a, לי אב, cf. also Nahmanides on Lev. 23.7, עבודה וצורך. שיש חסרון כים בבטלה שלהן כגון דבר האבד. Similarly Scaevola permitted works on the *feriae publicae*, where an irretrievable loss would occur, Macrobius, *Saturnalia*, I.16, 10. Of the three acts especially permitted by the Sifra and the Mekilta, one is mentioned in M. Shabbat XV.3, where we read מצייעין את המטות מיום הכפורים לשבת, and in T. Shabbat XII.16 only making beds and rinsing cups are mentioned as permitted on the Sabbath. In the

removed his fingernails by means of his nails, or his teeth, or if he pulled out the hair of his head, or his moustache, or his beard, according to sages, he has violated a *Shebut*. According to R. Eliezer, he is guilty of a sin offering. הנוטל צמרניו זו בוז או בשיניו. (Shabbat X.6). Elsewhere it is said that it is prohibited to trim a chip of wood in order to use it as a toothpick or to open a door therewith, but if he did, the sages consider this act a violation of a *Shebut* as we read: ואם קטמו . . . לחצוץ בו שניו ולפתח בו הדלת . . . וחכ"א אינו אלא משום שבות. Rashi *ad loc.* explains that trimming a chip is cutting in an irregular way (תקון כלאחר יד) (Betsah 33b). However, R. Eliezer admits that החיכת יבלת, the cutting of a wen from an animal falls in the category of *Shebut*.

The old Halakah prohibits various acts in connection with the preparation of food, such as grinding, kneading, and baking, but is silent concerning others.³⁹ Hence a dispute arose between R. Eliezer and the sages anent milking an animal,⁴⁰ curdling cheese, or taking honey out of a honeycomb on the Sabbath. In the opinion of the sages, it entailed only the infraction of a *Shebut* whereas R. Eliezer considered it a more severe offense (Shabbat 95a and parallel passages).

What may a woman do to adorn herself on the Sabbath with-

Y. Pesahim IV.4 there is a similar controversy. Thus a Baraita quoted by R. Phineas reads as follows: יום הכפורים שחל להיות בשבת שבתון שבות ובחול שבתון שבות. This text is understood to refer to the prohibition of הדחת כבשים ושלוקות. משום שבות. This very point is a subject of controversy between R. Eleazar and Rab in which Rab is in agreement with the Baraita. However, R. Eleazar's opinion coincides with that of R. Jose in T. Shabbat XII.16, (p. 128) and with Y. Shabbat XV end, where it is said: ואינו חושש שמא מתקן מקדש לחול.

³⁹ For example, the law concerning salting meat. Tosafot Yom Tob (Menahot X.7) explains that the meat of the שעיר could be salted on מוצאי because ליל שבת that occurred on the יום הכפורים. Tosafot, Shabbat 75b, s. v., refers to salting meat on the Sabbath only as an איסור דרבנן, cf. also Tosafot, Hullin 14a, s. v. ונסבין, for the prohibition of salting cooked meat, cf. *Orah Hayyim*, 321.5. Cf. also Lieberman, *Talpioth* II (1946), 378, note 15.

⁴⁰ Cf. טוב לחלוב לחוך האוכל כדי שיהיה שבות. 305, 13. אורח חיים טו מנן אברהם. דשבות. Cf. also Tosafot, Shabbat 43b, s. v. דחחב and Tosafot, Megillah 7b, s. v. כמן.

out infringing the law? To all intents and purposes there is no relevant ruling on the subject in the early law. However, the sages consider details like dressing the hair, painting the eyelids, and reddening the cheeks as prohibited, *משום שבות* (M. Shabbat X.6). Building a house is interdicted, but sweeping it, or sprinkling it, to keep the dust away is not allowed because of *Shebut* (Shabbat 95a). Sprinkling of the *מי הטמא* over a person who is impure may not be performed on the Sabbath, for it is forbidden as an act of *Shebut* in the view of R. Akiba (Pesahim VI.2).⁴¹

Lastly, carrying is prohibited on the Sabbath as one of the *ל"ט מלאכות*; nevertheless certain acts of carrying which did not conform to the *אב מלאכה* were put in the category of *Shebut*. Thus we read, if a man was reading a scroll of Scripture on the edge of the roof, and the scroll rolled out of his hand, it if does not reach ten handbreaths from the ground, he may roll it back to himself. R. Simeon says even if it touches the ground, he may roll it back to himself *כחבי עומד בפני כתבי* (‘Erubin X.3). Similarly, if one threw an object above ten *טפחים* from one private domain to another via a public domain, it is forbidden *משום שבות* (Shabbat 97a).⁴² In Pesahim VI.1, we learn that carrying a live animal on the Sabbath, and bringing it in from the outside to within the Sabbath limit, falls in the category of *Shebut* according to R. Eliezer. The story goes that once when R. Eliezer became ill, R. Akiba and his colleagues came to visit him on a Friday afternoon. R. Eliezer was sitting on his couch under his canopy, and they were sitting in the triclinium (the parlor). Late in the afternoon, his son, Hyrcanus, came to take off his father’s Tefillin, whereupon R. Eliezer rebuked him; so he departed in anger. When Hyrcanus said to the scholars, “It seems that my father’s mind is unclear,” R. Eliezer replied: “My son and his mother are confused; for otherwise how would they neglect a law concerning the kindling of the lights which is an *איסור סקילה* and trouble themselves

⁴¹ Cf. Tosafot, Megillah 20a, s. ולא v, cf. also M. Parah III.1.

⁴² Cf. also Y. ‘Erubin VI.7 and X.7, דתני שמואל למעלה מעשר שבות הוא, cf. שירי קרבן to VI.7.

merely about my Tefillin on the Sabbath which involves merely an איסור שבות^{42a}?

Thirdly, there was a circle of Tannaim who maintained that the miscellaneous rules that came to be classified as *Shebut* were all designed to preserve and safeguard the spirit of the Sabbath, which was in danger of being violated if observance of the ל"ט מלאכות only were insisted upon. For as we intimated a little while ago, the mere literal fulfillment of the Biblical precept proscribing work left many loop-holes for the desecration of the Sabbath. This is a necessary and logical inference from several instances in the Mekilta, where the law concerning *Shebut* is associated with verses containing the verb שמר, to keep or to safeguard.

Thus, Mekilta משפטים (ed. Horovitz, p. 332) reads לפי שהוא אומר לא תעשה כל מלאכה אין לי אלא דברים שהן משום מלאכה דברים שהן משום שבות מנין ח'ל ובכל אשר אמרתי אליכם תשמרו.

And again, in Mekilta Bo it is connected with the text ושמרתם את היום הזה⁴³ whereas the Mekilta diR. Shimon (p. 160) infers it from the phrase את שבתותי תשמרו. Consequently, the presence of three passages, all of which tie up the notion of *Shebut*, with the idea of שמר point to a well-established tradition that this term suggests the adoption of additional precautions to safeguard that particular law.⁴⁴ Traces of a similar notion may be detected in a later Amoraic interpretation. When the question was propounded in the academy⁴⁵ רמו לשניות מן התורה

^{42a} Sanhedrin 68a, Y. Shabbat II.7, and Tosafot, Shabbat 35b, s. v. רבי.

⁴³ Ex. 12.17 (ed. Lauterbach I.75). According to the Mekilta passage, the rules of *Shebut* do not apply to *Hol Hamo'ed*, cf. also Nahmanides to Lev. 23.24.

⁴⁴ The Amoraic interpretation of many of the acts forbidden משום שבות as preventive measures משום נזירה as in Betsah 36b-37a and elsewhere, can probably be traced back to this Tannaitic Midrash. Cf. also Bertinoro to Abot I.1.

⁴⁵ Yebamot 21a. According to Rashi, Abraham already observed the law of *Shebut*, for on the verse וישמר משמתי (Gen. 26.5) he remarks: נזרות להרחקה. על אזהרות שבתורה כגון שניות לעריות ושבות לשבת. Rashi's interpretation is based upon the rabbinic view that Abraham observed the whole Law, written and unwritten, cf. Yoma 28b, מפילו עירוב חבשילין and Rashi's comment שאינו הלכה

מנין R. Kahana cited the verse *ושמרתם את משמרת* (Lev. 18.30), which he explained as *עשה משמרת למשמרת*, which R. Joseph supplemented by the observation *דאורייתא ופירשו רבנן*, but it was subsequently rejected. Similarly, the Tannaim found in *ושמרתם* a sanction for *Shebut*.

Briefly to recapitulate, the three conceptions concerning *Shebut* that prevailed in the Tannaitic epoch were the following: According to the earliest view, *Shebut*, being derived from the Scriptural phrase *שבת שבתון*, embraced all such acts which were incompatible with the Sabbath rest, although they did not constitute work in the strict sense of the word. Later on another school of Tannaim, by no means rejecting the first interpretation of the term *Shebut*, extended its application so as to include definite species of work not listed in the *ל"ט מלאכות*, as well as the performance of certain of the *ל"ט מלאכות* in an irregular manner. This extension of the term they justified by the Scriptural phrase *כל מלאכה* instead of *מלאכה*. Thirdly, another group of Tannaim, less interested in determining the content of the term *Shebut* than in defining its purpose, found in the Biblical verse *ואח* and its two other equivalents, *שבתותי חשמרו* and its two other equivalents, an intimation that *Shebut* consisted of acts designed to safeguard the spirit of the Sabbath.

So far the Tannaitic lucubrations on *Shebut* have been limited to abstinence from labor in one form or another, recreations, and various sorts of physical exertions. However, from a rather early time there was a group of pietists who were pressing not merely for the remission of these activities, but even frowned upon the thought of work on the Sabbath, as we read in the Book of Jubilees (50.8), "Whoever says he will do something on it, that he will set on a journey thereon, in regard to any buying or selling, shall die."⁴⁶ Strong feelings on this subject are voiced in the Mekilta, which framed its attitude in the terse

למשה מסיני אלא תקנה סופרים שעתידין לחדש עירובי יפה. Chajes in his glosses to Yoma, *loc. cit.*, suggested to read *עירובי תחומין*, cf. also Bertinoro to Abot I.1.

⁴⁶ Cf. Albeck, *Das Buch der Jubilaeen und die Halacha*, p. 9, notes 44-45; Finkelstein, *Harvard Theological Review*, XVI, 1923, pp. 48-49. For Philo, cf. Belkin, *Philo and the Oral Law*, p. 200, note 29.

formula *שבות ממחשבת עבודה*⁴⁷ (to Ex. 20.9 ed. Lauterbach II, 253) which is repeated in the Mekilta diR. Shimon (p. 108), where this rule is illustrated by the admonition that one may not take a promenade in his field on the Sabbath with the avowed purpose of ascertaining its needs,⁴⁸ nor go to a bath-house in order to bathe therein immediately after dark, nor may one make necessary business calculations on the Sabbath, whether they pertain to past or future transactions (cf. also 'Erubin 38b).

It is related that a pious man once took a walk on the Sabbath to inspect his vineyard. When he noticed a breach in the fence, the necessity of repairing it on *מוצאי שבת* forthwith flashed through his mind. However, since this illicit thought occurred to him on the Sabbath, although involuntarily, he resolved never to carry out his plan. As a guerdon for his saintliness, the gap was closed up by the miraculous growth of a caperberry bush which nourished him for the rest of his days (Pesikta Rabbati, ed. Friedmann, 116b).

Other rabbis, in their zeal to enforce quiescence on the Sabbath, went so far as to outlaw superfluous conversation. The Pesikta Rabbati (*loc. cit.*) commenting upon the verse *שבת לה' אלהיך*, cites the view of R. Meir,⁴⁹ who remarked: Repose upon the Sabbath in the manner of your God: Just as He ceased issuing commands on the Sabbath, so do you abstain from non-essential talk on the Sabbath (Pesikta, *loc. cit.*). *שבות כאלהיך מה אלהיך שבת ממאמר אף אתה שבות מן המאמר*.⁵⁰

⁴⁷ Cf. also Abot diR. Nathan, 2nd version, chap. 21 (ed. Schechter, p. 45), and Pesikta Rabbati, 116b and Mekilta to Ex. 35.2, (ed. Lauterbach, III, 205). This is contrary to the view of the Babli Shabbat 113b, 150b, where we read *שלא יהא דבורך של שבת כדבורך של חול דבור אסור הרהור מותר*. Rashi explains *דבור* as follows: *להרהר בלבד כך וכך יציאות* and *הרהור* refers to *וממכר וחשבונות*: *אני צריך להוציא על שדה זו* or *שלא*, *s. v.* Tosafot, *loc. cit.*, and the interesting discussion in Israel Isser b. Mordecai Isserlin's *אשי ישראל*, Vilna, 1864, 52a and the authorities cited there.

⁴⁸ Cf. also Leviticus Rabbah 34, end.

⁴⁹ In the parallel passage in Y. Shabbat XV.3, it is given in the name of R. Abbahu. For some medieval tales bearing upon the rule of absolute rest on the Sabbath, cf. R. Basset, "L'Observation du Sabbath," *Revue des traditions populaires*, 1893, VIII, 250-254.

⁵⁰ Cf. Isserlein, *פסקים וכתבים*, no. 155.

And the Yerushalmi relates that R. Simon ben Yoḥai, noticing that his mother was indulging overmuch in chatter, said to her, "Mother, it is Sabbath," and she stopped רשב"י כד הוה חמי (Shabbat XV.3).⁵¹

To return to *Shebut* proper, it is important to recall, that according to the earlier⁵² Tannaim, acts which were prohibited משוב had the authority of a מצוה עשה,⁵³ a Biblical positive precept. This is evident from the fact that this rule was traced to one or another verse in Scripture. Similarly it is noteworthy that the Tannaim sharply distinguished *Shebut* from acts forbidden by rabbinical enactment, of which a number of examples may be cited from the Mishnah and Baraita.⁵⁴

We now come to the period of the Amoraim. We do not contemplate a resumé of the Amoraic interpretations⁵⁵ of *Shebut*.

⁵¹ The phrase והוה שחקה is omitted in the Yerushalmi, but is found in Pesikta Rabbati, *loc. cit.*, and Leviticus Rabbah, *loc. cit.*, cf. also Ginzberg, *Eine Unbekannte Jüdische Sekte*, p. 153, note 2. On the Sabbath Day no man shall utter a word foolishly, וביום השבת אל ידבר איש דבר נבל, cf. Schechter, *Documents of the Jewish Sectaries*, I, p. 10, lines 17-18, cf. also Isserlein, *Terumat ha-Deshen*, no. 61.

⁵² Consequently we find the view among the later Tannaim that *Shebut* was merely a rabbinical enactment and probably interpreted the verses merely as an אסמכתא. Those holding this opinion are R. Shimon, cited at the end of the Mishnah of 'Erubin, end, מקום שהתירו לך חכמים משלך נתנו לך שלא התירו לך, R. Nathan, Pesahim 65a, שבות צריכה התירו שאינה צריכה לא התירו, אלא משום שבות, and Rabbi השמשות, כל דבר שהוא משום שבות לא נזרו עליו בין השמשות, Shabbat 8b, and parallels, and Tosafot, Shabbat, 39b, s. v. ממעשה. For the latter, cf. also שער המלך, 13a.

⁵³ Weiss seems to be puzzled over this, cf. his remarks to his edition of the Mekilta, p. 13, note 8 and Sifra, 83a.

⁵⁴ Cf., e. g., the view of the sages with regard to the עיר של זהב when they maintain that תצא לא יצא, לא תצא, Shabbat 59b, or the rule concerning the prohibition of wearing certain weapons, לא יצא לא בשריון לא בקסדה ולא במנפים, and, ואם יצא אינו חייב, Shabbat VI.2.

⁵⁵ The Amoraim usually regarded acts forbidden שבות משום as rabbinical enactments designed to prevent an infraction of Biblical law, cf. above note 32. But occasionally there is reference to works performed in an irregular manner, e. g., מחמר כלאחר יד (Pesahim 66b). Hence Rashi ('Erubin 103a, s. v. אם בכלי, יד) explains that if one performs a חולדה in an irregular manner כלאחר יד, it is a שבות. E. g., חוזכין יבלת, which is a חולדה of גזוז. In M. Shabbat V.4 we read אין חמור יוצא . . . לא בזה אע"פ שהוא פקוק, and in the Babli (54b) the reason given

Rather we shall rest content with pointing out some of the principal modifications and developments in the Law sponsored by the Amoraim. To students of legal history, it is common knowledge that one of the important factors in the evolution of Law, is the gradual extension and application of antecedent legal principles and doctrines to meet or cover situations not intended or envisaged by the original framers of the statute, **משביתה אחת**, **למדו שביתות הרבה** (Y. 'Erubin X.26d).⁵⁶ In the presentation of the Tannaitic views, we considered only those passages where *Shebut* was explicitly mentioned. As the rabbis would say **היכא דאיתמר היכא דלא איתמר** (Berakot 24a, 'Erubin 47a and 56a) **היכא דגלי גלי היכא דלא גלי לא גלי** (Kiddushin 20b). We shall pursue the same method in interpreting the Amoraic conceptions.

First, it is of signal importance to keep the fact in mind that the Amoraim, perhaps with two exceptions,⁵⁷ consistently upheld

מסום דמיחוי כמאן דאזיל לחינא. In 'Erubin 102a Rashi (s. v. **נוטלים**) explains that **is only a Shebut**, because it is **מחוי כבונה**, because he gives a similar explanation in Shabbat 126a, s. v. **נועלין**. However, R. Tam (Tosafot, *loc. cit.*, s. v. **והמונה**) says it is **מסום מלטול**. However in Menahot 97a with reference to Rashi says it is not a **שבות** rather **דמחוי כבונה וסותר**. In Ketubot 60a we read **יונה חלב בשבת מאי טעמא יונק מפרק כלאחר יד ובמקום צערא לא גזרו רבנן**. On this passage R. Yom Tob of Seville remarks as follows: **עיקר הפירוש מסום דהויל שבות דרבנן על ידי שנוי ומסום הכי לא גזרו בו רבנן בחולה שאין בו סכנה אבל שבות נמור שלא בשנוי לא התירו בחולה**. This is quoted in the *מקובצת* to Ketubot, *ad loc.*

⁵⁶ This passage means as follows: From one instance of **שבות** which is directly alluded to in Scripture, that is, the rule concerning **שבת תחום** we infer by analogy all the others. From M. Pesahim VI.2 we learn that R. Eliezer holds **הבאחו מחוץ לחחום** to be a **שבות**, and on Ex. 16.29 **אל יצא איש ביום השביעי**, the rabbis remark **אמה אלו אלפים**, cf. B. 'Erubin 51a, Y. 'Erubin IV.1. Targum Pseudo-Jonathan, *ad loc.*, and Zohar II.207a. This verse is the only instance, where Scripture prohibits other than mere manual labor on the Sabbath; cf. also Y. Pesahim VI.2, 33b, ll. 26–27, and ll. 41–42. According to R. Jose, the law concerning **תחומין** was already observed by Jacob **וקבע חמה** (Bereshit Rabba, 11.7, ed. Theodor-Albeck, p. 95). According to R. Aha b. Jacob, one Tanna was of the opinion that the laws concerning **תחומין** were given at Marah, **מר סבר אחחומין נמי אפקיד** (Shabbat 87b) and in Yebamot 47b we read that Naomi taught Ruth **שבת תחום** (56a). Cf. also Menahot 7b and parallels, cf. also Tosafot, Shabbat 34a, s. v. **לא** and Gittin 6b, s. v. **עירבתם**.

⁵⁷ R. Mana, who quoted the Baraita about **קניבת ירק** where it was derived

the view that acts prohibited משום שבות were only rabbinical ordinances or גזירות, as they are termed in Betsah 36b. It is also curious that none of the Tannaitic interpretations which connect *Shebut* with a Scriptural verse, is cited in the Babli or Yerushalmi. Is this the reason why the Amoraim regarded *Shebut* as rabbinical, or is the omission purely accidental, and should we seek for another explanation for the Amoraic sanction of *Shebut*?

Secondly, the later Babylonian Amoraim are to be credited with the formulation of the doctrine אמירה לנכרי שבות, which occurs five times in the Babli. To be sure, the rule prohibiting a Jew to order a Gentile to perform work for him on the Sabbath is presupposed in the Mishnah (Shabbat XVI.6), נכרי שבא לכבות, and in the Mekilta Bo (ed. Horowitz, pp. 30–31) it is derived from the verse כל מלאכה לא יעשה בהם, upon which the following comment is made, לא תעשה אתה ולא יעשה חברך ולא יעשה גוי מלאכתך (cf. also *Birke Joseph* to *Orah Hayyim* 243). According to the Mekilta this rule would have Biblical sanction, and it is not forbidden merely משום שבות.⁵⁸

The three Amoraim, mentioned by name, who quote the principle אמירה לנכרי שבות are Rabbah, Abaye, and R. Ashi. One of the Rabbah's close neighbors gave birth to a boy on the Sabbath, and in anticipation of the circumcision on the next Saturday, hot water was prepared on the preceding Friday. As luck would have it, the hot water was spilled out before the circumcision. Whereupon Rabbah suggested that a Gentile be asked to bring some hot water from his home. After the cere-

from שבתון שבות, Shabbat 114b. Cf. Rashi, *ad loc.*, who remarked דמידי דאלו גראה לרי' נראה לרי' ולא observed Tosafot, s. v. דאסמכתא בעלמא היא לחם משנה (*Hilkot Shebitat Asor*, beg.) noticed also that קניבת ירק is a Biblical command, but holds that *Shebut* is קניבת דרבנן for דאי לאו דרביה קרא לא היה איסורו אלא משום שבות שאין איסורו ירק is an exception מדרבנן. Secondly, R. Aḥa b. Jacob held some *Shebut* to be an עשה for he derived the rule להטות ענף על גבי בהמה from אמר קרא למען ינוח שורך (Ex. 23.12), cf. Y. Betsah V.2; cf. also the statement of R. Aḥa b. Jacob (Baba Kamma 54b) עבר, and Rashi remarks, אמר קרא למען ינוח עבדך להנחה הקשתיו ולא לדבר אחר להניח נכרי לרכוב על סוס בשבת לא ידעתי, cf. Mordecai, Shabbat 241, ואמה לבהמה איסור דבשום מקום לא מצינו בנורו על שביחה דרבנן.

⁵⁸ Cf. also Beth Joseph, *Tur*, *Orah Hayyim*, 244, Meldola, *Mayyim Rabbim*, I.16, and ט"ו to *Orah Hayyim*, 243, end.

mony, Abaye argued against the decision of his master Rabbah, stating that it was inconsistent with Tannaitic precedent. מכרי הזאה שבות ואמירה לנכרי שבות מה הזאה שבות ואינה דוחה את השבת אף הזאה שבות ואמירה לנכרי שבות ואינה דוחה את השבת. To which Rabbah replied: 'Erubin 67b, 68a).⁵⁹ In a discussion of the Mishnaic ruling לא יאמר אדם לחבירו לשכור לו פועלים the Amoraim expressed surprise at the obviousness of this statement. Whereupon R. Papa made the observation that חבירו refers to a Gentile, which called forth from R. Ashi the remark that אמירה לנכרי שבות (Shabbat 150a). Further, it is given on Amoraic authority, that if one purchases a house in Palestine (Baba Kamma 80b)⁶⁰ or if one acquires a field in Syria, it is as if it were bought in the suburbs of Jerusalem (Gittin 8b),⁶¹ and the deed of purchase may be written even on the Sabbath through the agency of a Gentile. Exception was made in these cases משום ישוב ארץ ישראל.

An interesting problem posed by the Amoraim was the following: Did the principle אמירה לנכרי שבות⁶² apply only to rules concerning the Sabbath because the desecration thereof entailed the severe punishment of סקילה, or to all other prohibitions? For example, was it permitted for a Jew to instruct a Gentile to muzzle his cow and thresh grain therewith? (Baba Metsia 90a).⁶³ Thus we see that the Amoraim were inclined to apply the term *Shebut* to laws other than the Sabbath.

Lastly, the Amoraim developed the principle^{63a} אין שבות במקדש, i. e., acts which were prohibited משום שבות were permitted in the Temple. This rule was first formulated by R. Hisda, although it was already envisaged by the earlier Palestinian Amora R.

⁵⁹ Cf. Alfasi to Shabbat, chap. 19, end, who gives a full discussion of this point and Mordecai, Shabbat, 313.

⁶⁰ Cf. Tosafot, *ad loc.*, s. v. אומר and Klein, *Jeschurun*, XIII (1926), nos. 3-4, pp. 138-143.

⁶¹ Cf. Tosafot, *ad loc.* s. v., אף.

⁶² Cf. Shabbat 129, כדרכה המנונה דבר . . . כדרכה המנונה בשבת . . . כל צרכי חולה נעשין על ידי ארמאי בשבת. ש"אין בו סכנה אומר לנכרי ועושה. Cf. also *Orah Hayyim*, 307.5. Cf. also Lampronti, *Pahad Yitshak*, s. v. אמירה לנוי, ed. Lyck, 1871, pp. 178 ff.

⁶³ Cf. Tosafot, *ad loc.*, s. v. אבל and ראש, VII.6 and חריפתא *ad loc.*

^{63a} Cf. Saul Hayyim, כלילת שאול, Vilna, 1879, 34-35.

Jonathan. Commenting upon the Mishnaic rule that the priests used to wash the Temple court on a Sabbath that occurred on the eve of the Passover שהכהנים מדיחים את העזרה שלא ברצון חכמים, R. Hisda observed that the חכמים in this passage, stand for R. Eliezer, whereas the majority of the scholars raised no objection to the practice of the priests because אין שבות במקדש (Pesahim 65a).⁶⁴

Another allusion to this doctrine was made by R. Mana, in connection with the domestic arrangements of the High Priest for Yom Kippur. According to R. Judah, a second wife was set aside for the High Priest seven days before the Day of Atonement, lest his own wife die. אף אשה אחרת מחקינין לו שמא תמות אשתו שנאמר וכפר בעדו ובעד ביתו זו אשתו. R. Mana was asked: Suppose the wife of the High Priest should die on Yom Kippur, how could he betroth the second woman on that Day? Would he not be acquiring a possession on the Sabbath? קונה קנין בשבת. לא נמצא. To this he replied that it would be permitted, משום שבות שהתירו במקדש (Y. Yoma I.1).

The manner in which the Amoraim cite the principle אין שבות במקדש in these two instances⁶⁵ shows that this rule had been deduced from another set of regulations. The question naturally arises, what is the source for this Amoraic principle? It is most natural to turn to the last chapter of the M. 'Erubin (X.11-14),⁶⁶

⁶⁴ Cf. שבות יעקב, III.67.

⁶⁵ That is without giving a source or referring to some Mishnah. Cf. also Aaron ha-Levi, מטה אהרן, Salonica, 1819, s. v., אין שבות במקדש, 9a.

⁶⁶ Cf. Tosafot, Pesahim 65a, s. v. המכבד, who say שבות אשכחן בפרק. In M. 'Erubin, end, we have the statement of R. Shimon, מקום שהתירו לך חכמים משלך נתנו לך שלא התירו לך אלא משום שבות. The phrase משלך נתנו לך is unique in the Mishnah. Prof. Lieberman called my attention to four passages in the Yerushalmi, namely, Terumot XI.1, Rosh Hashanah II.1, Yebamot VII.1, and XIII.1, where this identical phrase is used in the sense of והן אמרו . . . הן אמרו . . . בדין היה שלא. The meaning of the Mishnah is: the various instances in which the sages permitted you to perform certain acts in the Temple on the Sabbath were in violation of no law (בדין היה שלא יאסרו) for their permission extended merely to actions forbidden שבות משום. In view of the fact that this phrase משלך נתנו לך was unknown to the Babylonian Amoraim, they were compelled to interpret this Mishnah differently. What one may infer from R. Shimon's statement is the correct observation of

which enumerates the following six acts that are permitted in the Temple, on the Sabbath, but not outside of its precincts.

(1) Locking the gate of the Temple with a bolt⁶⁷ attached to the door במקדש בו נועלים בו.⁶⁸ (2) Returning the lower pivot of a door to its socket, במקדש. (3) The tying of a broken string of a musical instrument נימא במקדש. (4) Replacing of a plaster במקדש רטיה. (5) The cutting of a wen חותכין יבלת of an animal to remove its blemish.⁶⁹ In the Tosefta, there is also a reference to the cutting of a wen from the back of the High Priest. (6) The wrapping of reed grass around the wounded hand of a priest כהן שלקח באצבעו כורך עליו גמי.

Of the six acts which the Tannaim considered essential in connection with the Temple services,^{69a} none is specifically mentioned by them as *Shebut* except the rule pertaining to חותכין יבלת which was held to be a *Shebut* only by R. Eliezer (Pesahim VI.2). While the offering of the Tamid and the Musaffim was permitted on the Sabbath,⁷⁰ the Tannaim did not formulate a definite principle whereby it could be determined

R. Jonathan במקדש החירו שבועות, but not the far reaching opinion of R. Hisda, שבועות במקדש.

⁶⁷ Cf. Krauss, *Talmudische Archäologie*, I, 342, note 514; cf. also Yebamot 96b.

⁶⁸ In view of the fact that the Daily Sacrifice which was brought on the Sabbath also could not be offered before the opening of the Gate of the Temple, there was a reason for the special permission to repair the Temple Gate, cf. M. Tamid III.7, and 'Erubin 2a and Tosafot, *ad loc.*, s. v. שלמים, cf. also M. Sukkah V.5 with reference to the blowing of the Shofar at the מתיחה and M. Shekalim V.1 with regard to the שיערים.

⁶⁹ Cf. also Lieberman, תלמודה של קסרין, p. 23.

^{69a} M. 'Erubin X.14-15 enumerates three other acts essential in connection with the Temple service. (1) בוחקין מלח על גבי כבש, scattering salt on the ascent to the altar. (2) ממלאין מבור הנולה ומבור הגדול בגלגל בשבת, the drawing of water from two cisterns in the Temple court with a wheel on the Sabbath. (3) שרץ שנמצא במקדש כהן מוציאו בהמיוו, the removal of a dead reptile by the priest with his girdle. In these three cases, the phrase לא במדינה is not used. Note that in M. Shabbat X.3 we read ... בפגרתו ופיה למטה ... המוציא ... מוציא כדרך המוציאין.

⁷⁰ Cf. Rashi ('Erubin 102b, s. v. זה אפילו) במקדש לא הותרה במקדש ומלאכה דאורייתא חוץ מהקרבת המידין ומוספין וקרבת צבור שדוחין את השבת מניירת הכתוב ועבודה. s. v. Shabbat 132b.

'Tis true that R. Akiba established a general rule in connection with the preparation of the חביתִי כהן גורל, that those acts which could not be performed on the eve of the Sabbath, could be performed on the Sabbath. כל מלאכה שאפשר לה לעשות מערב שבת (Menaḥot XI.3). However, this rule he applied not only to the Temple sacrifices, but also to the Paschal Lamb (Pesahim VI.2) and to circumcision on the Sabbath (Shabbat XIX.1). In the Mekilta, it is specifically stated that fire may be handled in the Temple on the Sabbath.⁷¹ לא תבערו אש בכל מושבותיכם במושבות אין אתה (ed. Lauterbach III, 209). On the other hand, if the horn of the altar was broken off, or if the knife became defective, it is not permissible to repair them on the Sabbath. כגון שנטלו קרנו של מזבח או נפגמה הסכין שומע אני יחכם. בשבת ת"ל ויקהל משה בחול ולא בשבת (Mekilta III. 206). With regard to the לחם הפנים the Mishnah informs us that neither the ordering of the reeds nor their removal superseded the Sabbath לא סדור (Menahot XI.3).⁷² From these

⁷⁴ Cf. Tosafot, Shabbat 123b, s. v. לא, where the following remark is made, אע"ג דאין שבות במקדש כמה שבותים אשכחן במקדש שגורו חכמים לצורך כי הכא. Cf. also Tosafot, Shabbat 95a, s. v. שרא, 'Erubin 102b, s. v. העליון. Cf. also Y. Sanhedrin X.2 (29a).

examples it is quite evident that while the Tannaim considered certain acts essential and others non-essential, they never laid down any general rule on the subject.

In any event, the Amoraim did formulate⁷³ the principle *אין שבות במקדש* which they read into the following statements: (1) *מחזירים רטיה* (Betsah 11b); (2) *מחזירין ציר התחתון* (R. Jose b. R. Bun, Y. 'Erubin X.11);⁷⁴ (3) Looping of broken stringed instruments *עניבה דלא אתי לידי חיוב חטאת שרו ליה רבנן* 'Erubin 105a (cf. especially R. Hananel); (4) Baking of the *לחם הפנים* on preceding the Sabbath (Pesahim 47a); (5) *כהנים מריחים* (Pesahim 65a by R. Hīṣda; Y. Pesahim V.8, by R. Jonathan); (6) *חקיעה השופר* (Shabbat 114b R. Joseph); (7) Bringing the Paschal lamb from Jerusalem into the Azarah on the Sabbath before Passover *לחון לחון לא אמר אל* (Y. Pesahim VI.1 33b),⁷⁵ in accordance with the view of R. Hīyya; (8) The rule that the Paschal animal could carry the knife in its wool or between its horn was in the category *מחמר כלאחר יד*. Hillel was supposed not to have known that this was a *דבר שבות במקום היתר* (Pesahim 66b); (9) *משלשין את הפסח* (R. Safra, 'Erubin 103a explained by R. Joseph because *בני חבורה זריזים הם*); (10) The laying of the hands on the sacrifice (*סמיכה*) noted by R. Johanan;⁷⁶ (11) *הילוך זריקה וקבלה אינה שבות* (Y. Shabbat II 5).^{76a}

⁷³ The formulation of legal principles is always a difficult task as Jhering pointed out. It requires *Beobachtungsgabe* und *Darstellungstalent*. Sometimes the formulation is too narrow, sometimes too broad. One may have a clear notion of the underlying principles of law, but find it difficult to express it adequately (*Geist des römischen Rechts*, I, 4th ed., pp. 28–31). Here too, the Amoraim could not help noticing that a certain group of Sabbath laws was superseded in the Temple, and they endeavored to find a terse legal maxim that would embrace all the given cases. But the phrase *אין שבות במקדש* was too broad as many exceptions had to be admitted by the Amoraim, and post-Talmudic authorities found other inconsistencies.

⁷⁴ Rashi ('Erubin 102b) explains *כנון שצריכים לו לדבר קרבן כנון שהיה שם מלח* או לבונה או קטורת.

⁷⁵ Cf. to ריטב'א 'Erubin 102b.

^{75a} Cf. Joshua Isaac Slonim *עמק יהושע* II.9, ed. Jerusalem, 1925, p. 39.

⁷⁶ Cf. above note 15.

^{76a} Cf. Rashi to Yebamot 33a, *טלטול בעלמא הוא*, where he remarks *ואין כאן שבות*, which Strashun corrects to *שבות אלא כאן שבות*.

Without going into the origin of the Amoraic rule אין שבות ⁶⁰ suffice it to say that the Amoraim applied it to eleven different new cases not envisaged by the Tannaim, and were well aware of its limitation, as is evident from the fact that they admitted the following five exceptions to this rule.⁶¹

(1) R. Jonathan remarked **לא כל שבות התירו במקדש** (Y. Pesahim V.8, and repeated by R. Jose b. R. Bun, Y. 'Erubin X.11, cf. also Y. Pesahim VIII.3, Betsah V.2). (2) R. Joseph observed **שבות דמקדש במקדש התירו שבות דמקדש במדינה לא התירו** ('Erubin 103a). (3) The same scholar noted also **שאין דוחין שבות להתיר** (Shabbat

⁷⁷ Cf. Lieberman, הירושלמי בפשוטו, p. 193.

⁷⁸ Cf. Maimonides, שו"ת, XXIV.11 and *Orat Hayyim*, 343. Cf. also Rashi, Shabbat 131b, s. v. וועדיין במתן תורה לא נאסר טלטול who remarks

מעתה אמילו בבית הקברות ראוי הוא לעבור על השבות ולוכלל 'Erubin III.1. Cf. Y. שכן הוא ראוי ליכנס בשדה חיבה ומגדל ולעשות לו חור פחות מטמא ולהחוב בכוש ובקיסם explains that the מטול הכוש והקיסם is the *Shebut*, but cf. Lieberman, The שבת, where he says כהן, s. v. 'Erubin 104b, cf. also Rashi to p. 261, הירושלמי כפשוטו וכו' תימא שא ליה לר' נחמיה דין, cf. Betsah 32a, ולא חייס למטול דאין שבות במקדש דלטול שבות הוא ולא, upon which Rashi comments, שבות שבת לשבות יום טוב ועוד (הא. s. v. Shabbat 124a), Tosafot (Shabbat 124a, cf. also החמיר במטול יום טוב כבשל שבת יש לומר דאין בין דפ"ק דמנילה מירא במילי דאורייתא ואין בין דהכא היינו דתנן במשילין מטול. Cf. also Rashi to Sukkah 42b, s. v. דמיררו במילי דשבות.

^{79a} Shabbat 24b. This passage has been properly explained by Chajes in his gloss to Shabbat 114a, cf. also Rashi to Betsah 27b, *s. v.* חלה and Tosafot, Kiddushin 34a, *s. v.* מעקה.

⁸⁰ For numbers 10, 11 and 12 do not refer to the Temple service.

⁸¹ The Roman jurists also took notice of exceptions to general rules. Cf., e. g., the observation of Celsus with regard to the rule of Cato on legacy. *Quae definitio in quibusdam falso est*. This rule is not true in certain cases. (*Digest* 34.7.1)

114b). (4) R. Shisha b. R. Idi inferred that שבות קרובה התירו שבות רחוקה לא התירו (Shabbat 114b). (5) R. Ashi quoting R. Nathan remarks, שבות צריכה התירו שבות שאינה צריכה לא התירו (Pesahim 65a).

While the Tannaim distinguished between two kinds of *Shebut* we find that the Amora R. Isaac classified these forbidden acts into three categories. (1) שבות גרידה (2) שבות דרשות (3) שבות דמצוה (Betsah 37a), and Rabbah discriminated between שבות דאית ביה מעשה and דלית ביה מעשה ('Erubin 68a). Lastly it should not be overlooked that there is a group of acts forbidden on the Sabbath by the rabbis מדרבנן which are separate from *Shebut*.

When we reach the post-Talmudic period, we enter upon a vast terrain in which legal acumen and imagination have worked diligently to define and interpret, to fuse and to harmonize the heterogeneous rules on *Shebut* in the Talmud and to bring a semblance of unity and system into the widely divergent regulations on this subject.⁸² Let us pause for a moment to scrutinize their interpretation of the doctrine of *Shebut*. It is curious to

⁸² They also extended the term *Shebut* to many acts not so explicitly designated by the rabbis of the Talmud, e. g., Rashi puts the following in that category: Healing on the Sabbath ('Erubin 103b, s. v. אבל לא במרינה), taking bread out of an oven (Shabbat 3b, s. v. הדביק), one who goes out with a needle sticking in his garment (Shabbat 11b, s. v. מאי לאו), killing a gnat (Shabbat 12a, s. v. מולל חורק), immersion of vessels (Shabbat 34a, s. v. אין מטבילין, cf. also Responsa, *Shaagat Aryeh*, no. 56), the extinguishing of a piece of red hot metal (Shabbat 42a, s. v. נחלח and הלכך, cf. רש"י *ad loc.*), carrying in a courtyard (Shabbat 130b, s. v. שלא ברצון), examining a first born animal for its blemish and giving a verdict thereon (Betsah 26a, s. v. אין זה מן המוכן), carrying a living being (Yoma 66b, s. v. כמאן), the prohibition of putting away food on Friday evening even into something that will not increase its heat (Shabbat 34a, s. v. אי הכא). Similarly Tosafot consider the absolution of vows, ('Erubin 30b, s. v. אלא) and likewise Maimonides says about plucking from a flower pot that is not perforated (Shabbat XXIV.11), cf. also *Ma'akalat Asurot*, XVII.27. Flaying the hide by cutting it into tiny pieces is only a *Shebut*, cf. Rashi, Shabbat 117a, s. v. דשקיל, but Tosafot, *loc. cit.*, disagrees. Cutting off superfluous berries from the myrtle branch on the Sukkot festival is a violation of *Shebut*, cf. Rashi, Sukkah 33a, s. v. עבר ולקטן. According to R. Yom Tob of Seville, the immersion of a proselyte on the Sabbath is a violation of a *Shebut*, cf. Yebamot 46b.

relate that R. Nissim of Kairwan took his cue from a Tannaitic Midrash,⁸³ when he ascribed Scriptural authority to *Shebut*. To quote his own words: אמר הקב"ה ביום אחד לחורש השביעי שהוא יום ראש השנה יהיה לכם שבתון זה מקרא מלא בצווי השביתה ואמר עוד מלאכת עבודה לא תעשו הזהיר בו מלעשות מלאכות מיוחדות נמצא עלינו (cf. Shabbat 134a).

Tobiah b. Eliezer, in his book לקח טוב to Lev. 23.3, writes in a similar vein. In his view, *Shebut* constitutes acts which are not work proper, but are nevertheless Biblically forbidden. He goes one step further, and deduces the principle אמירה לנכרי שבות from a specific verse, פירוש שבות לפי שיש דברים שאינה מלאכה והזהירה התורה בהם משום שבות. לא עולין באילן וכו'. ואמירה לגוי שבות ולא דחי שבת זהו שבת שבתון שהרי אמר הכתוב כל מלאכה לרבות אמירה לנכרי.⁸⁴

Rashi, in his commentary, taking the lead from the Amoraim, assumes everywhere⁸⁵ that *Shebut* is purely a rabbinic enactment, but he is keenly aware that different kinds of acts⁸⁶ are lumped into the general term *Shebut*. Tosafot,⁸⁷ agreeing with Rashi, make it a point to deny that *Shebut* is of Biblical provenance, and declare the Biblical verse quoted in the Sifra to be merely an intimation, i. e. אסמכתא (Bekorot 54a, s. v. ושני v. אשכחן כל מילי).

⁸³ Sifra, 101c.

⁸⁴ According to Maimonides (שבת VI.1) the reason why the rabbis introduced the rule is כדי שלא תהיה שבת קלה בעיניהן ויבואו לעשות מעצמן cf. also the remark of the הגהות מיימוניות *ad loc.*, לחומר, כי יש שליחות לגוי לחומר, even if he gives a Gentile money on Friday to purchase something for him on the Sabbath.

⁸⁵ Cf., e. g., Shabbat 115a, s. v. מותר and in 'Erubin 97b, s. v., משום שבות, he observes, כל איסור דרבנן הוא שבות, and 'Erubin 33a, s. v., ואסור ליטלו, he remarks, כל איסור שבות ויום טוב דהוי מדרבנן קרי שבות, and Sanhedrin, 67b, s. v. כהלכות שבת. On this passage, cf. also Isaac Galico, דמלאכות בסקילה ושבות פטור אבל אסור.

⁸⁶ Rashi and Tosafot noted that there are different degrees of *Shebut*. Thus Rashi ('Erubin 103b, s. v. אי אמרת) speaks of שבות קלה וחמורה and in Pesahim 66b he remarks שבות דכל כלאחר כמור כשאר שבות דכל כלאחר שכיחא, and Tosafot (Pesahim 66b, s. v. הנה) observe שבות דבהמתו קיל, and in 'Erubin 102b, s. v. והעליון, the Tosafot state שבות עצמו, and in 'Erubin 102b, s. v. הוא דרבנן דשבות גדולה כזו לא התירו במקדש. On this passage, cf. also Isaac Galico, Leghorn, 1742, 36c.

⁸⁷ Cf. Gross, *Gallia Judaica*, p. 482 and Tosafot; Yebamot 67b–68a, s. v. ההיא דספרי אסמכתא הוא וכמה דרשות יש בגמרא, קנין שדורש בחזרת כהנים ובספרי מפוסקים אחרים. Cf. also Tosafot Pesahim 56b, s. v. כלל, and R. Asher, Baba Kamma VII.3.

דשבות ומשום מצוה בפרק משילין דדריש בתורת כהנים ומשבתון שבות אסמכתא בעלמא היא.

Maimonides' view of *Shebut* may be described as a synthesis of the Tannaitic and Amoraic conceptions. According to him, certain acts prohibited *משום שבות* are Biblical⁸⁸ in origin, while others are rabbinically⁸⁹ ordained. The latter fall easily into two groups, those which resemble forbidden works,⁹⁰ and those which were prohibited to insure against infraction of Scriptural laws (*Hilkot Shabbat* XXI.1).

The fullest discussion extant of the doctrine of *Shebut* is found in Nahmanides' commentary on the Pentateuch (Lev. 23.24). Nahmanides, after citing three Tannaitic Midrashim dealing with *Shebut* is inclined to believe that it has Biblical sanction, and that the verses are not merely אסמכתות. He interprets *Shebut* to be מנוחה אפילו מדברים שאין מלאכה. The violation of *Shebut* however, entails neither penalty of מיתה or כרת. So much for the theories of *Shebut* in post-Talmudic Judaism.

It is perfectly natural that the later legalists developed and broadened the notion of *Shebut*, and hence were enabled to attach the label of *Shebut* to many acts not so designated specifically in the Talmud. משביתה אחת למדו שביחות הרבה (Y. 'Erubin X, end).

Thus, the Tosafot suggested that the use of instrumental music on the Sabbath and Festivals⁹¹ was prohibited *משום שבות*.

⁸⁸ From the Biblical verse חשבות, cf. above note 17. However there are other acts which are prohibited because of the verse חשיב משבת רגלך עשות אסור. Although they do not resemble prohibited works, nor are they of such a character as to invite the performance of illegal labors. (*Shabbat* XXIV.1).

⁸⁹ That is *משום שבות* חכמים שאסרו הרבה הן. With regard to the punishment of rabbinical enactments, Maimonides (I.3) writes that if איסורו מדברי סופרים והוא הרחקה מן המלאכה והעושה אותה בזדון מכות מדרות. For the punishment of a violation of a *Shebut*, note 'Erubin 63a, where we read that Rabina excommunicated a man for tying his donkey to a palm-tree on the Sabbath, and Rashi remarks *משום שבות* באילן משום שבות, cf. also Mordecai to *Shabbat* 248, מכות מדרות, ללקות מכות מדרות, וכן פסק רבינו גרשום באחד שקנה סוס בשבת דצריך ללקות מכות מדרות, מדרבנן.

⁹⁰ Cf. above, note 55.

⁹¹ Cf. also Tosafot, *Sukkah* 50a, s. v. שאינו and Maimonides, III.6.

Since the Amoraim had already extended the use of the term *Shebut* to laws other than the Sabbath, it need occasion us no surprise to find post-Talmudic authorities doing the same.^{94a} Thus, in an inquiry addressed to Nahmanides, the following question was posed: May a husband who has some knowledge

^{94a} Cf. also Lampronti, *Pahad Yitshak*, s. v. אַפּמאַלט, ed. Lyck, 1871, p. 201. With regard to the rule of burial on the Festival and the rule of *Shebut*, cf. gloss of מַצֵּה מִיָּחֹן to Rosh Hashanah, 20a.

The medieval authorities discussed at length the principle of **אמירה לנכרי שבות**⁹⁶ and permitted it to be set aside in case it is necessary to perform another **מצוה**.⁹⁷ Thus R. Joel ha-Levi permitted one to tell a Gentile to play music on the Sabbath at the celebration of wedding festivities since it is a **מצוה** to have music at weddings (quoted in Mordecai, Betsah 696 and *Tur, Orah Hayyim* 338). He also allowed one to request a Gentile to bring an Etrog on the Festival even if it were outside the city limits, since the law⁹⁸ about **תחומין** was merely rabbinical (Mordecai, Sukkah 747).

This unusual view he derived from an interpretation of the Yerushalmi. Commenting upon the Mishnah הכותב שתי אותיות מהו בכל לשון אלף אלפא ביתא ... The Yerushalmi⁸ adds

⁶⁶ Cf. the general rule laid down by Maimonides (Shabbat VI.9) when שויתור הוא חמור is permitted and ר'ן to Aboda Zarah 28b remarks שבות על ידי ישראל ממלאכה נמורה על ידי גוי.

^{77a} For the concept of שבות דשבות which is common in early authorities, cf. e. g., Meiri to Shabbat 130b, New York, 1945, 76d.

⁹⁸ Cf. Lieberman, *הירושלמי כפשוטו*, pp. 174–175.

ביטא. R. Joel explained this passage to mean, that the Biblical prohibition of writing on the Sabbath refers to writing in the Hebrew or Greek script, and remarks that Rashi erred in holding that the rule applies to writing in any script⁹⁹ (ראבי"ה I.441).

R. Hai sanctioned the custom of dancing on Simḥat Torah בשעה שאומר קלוסים לתורה, although dancing is prohibited on the holiday משום שבות החורה (cf. Responsa, R. Joseph Kolon, No. 9).¹⁰⁰

R. Solomon Luria cites with seeming approval the decision of an older scholar, who permitted a Jew to order a Gentile to kindle a Jahrzeit lamp for him at twilight of the Sabbath, if the Jew forgot to do it while it was still day. Since the Jews of Germany were punctilious in observing their customs, it was considered a צורך גדול and consequently overruled the law אמירה לנכרי שבות (Responsa of Luria, 46).¹⁰¹

Before concluding this part of the discussion, may I briefly allude to the Sabbatarian excesses of Puritan New England, which outdid in severity some of the rules of *Shebut*.¹⁰²

Of the so-called "False Blue Laws" of Connecticut which were forced upon the populace by the Reverend Peters, the following are germane to our topic: "No one shall travel . . . sweep the floor . . . on the Sabbath Day." "No one shall ride on the

⁹⁹ Cf. also הגהות מיימוניות to *Hilkot Tefillin* I.19, and VII, end note 40, Isserles, *Orah Hayyim*, 306.11, Beer Heteb, *ad loc.*, and to 340; note 10, notes of Elijah of Vilna to 306 and Leiter, בית דור, no. 58, cf. Fugelman, in *Nerot Shabbat*, vol. V (IV), 1948, nos. 95-96, p. 167.

¹⁰⁰ Quoted also in *Tur Orah Hayyim*, 339.

¹⁰¹ Cf. also אברהם מן to אורח חיים 268.8 and Beer Heteb to 261.1; 342.1 and 307.5.

¹⁰² Viscount St. Cyres, after referring to the stringent rules concerning the Sabbath in the Talmud, remarks as follows, "Though indeed we might look nearer home than the Talmud for similar absurdities, most Puritan Communities could furnish strange freaks of Sabbatarian casuistry," cf. his article "Casuistry" in the *Encyclopedia Britannica*, 11th ed., vol. 5, p. 485. The medieval Sunday was by law a day of strict religious observance and *sabbatizare* is a good medieval term for Sunday observance. (Coulton, *Medieval Village*, Cambridge, 1925, p. 254). On casuistry, cf. Lea, *A History of Auricular Confession and Indulgences*, Philadelphia, 1896, vol. II, 285-411.

Sabbath Day, or walk in his garden or elsewhere, except reverently to and from the meeting."¹⁰³

The Vermont "Blue Book" contained the following regulation: Whoever was guilty of rude, profane, or unlawful conduct on the Lord's Day, in words or action, by clamorous discourses, shouting, hallooing, screaming, running, riding, dancing, jumping, was to be fined forty shillings, and whipped upon the naked back not more than ten stripes. A man from the state of Maine who was rebuked and fined for "unseemly walking" on the Lord's Day protested that he ran to save a man from drowning.¹⁰⁴ As late as the year 1831, in Lebanon, Connecticut, a lady journeying to her father's home was arrested within sight of her father's house for unnecessary travelling on the Sabbath.¹⁰⁵

It seems to be an historical fact that in most societies, ritual and traditional forms of worship must become a matter of public concern if they are to be preserved. When that occurs in the course of time, as it needs must be, there is always an inevitable tendency for a stark legal attitude and approach to dominate the cult, with the consequent danger that undue stress will be laid upon the externalities of conduct while sight is lost of the purpose for which the laws and symbols came into being. There is always present the possibility that the letter of the law killeth and prevents its spirit from giving life. However, in Judaism, the rabbis never took their eye off the ultimate and spiritual meaning of the Sabbath, in spite of the elaborate casuistry that was employed in the exposition of the Law.

How extensive the rabbinic interpretation of the Sabbath law was, may be gauged from the fact that more than forty treatises of the Mishnah impinge on Sabbath legislation, and that every tractate that contains both Babli and Yerushalmi happens to discuss some aspect of the Sabbath discipline. Moreover, the Tannaitic compendia begin and end with a rule touching on the Sabbath question.

¹⁰³ Alice M. Earle, *The Sabbath in Puritan New England*, New York, 1892, p. 245 and E. Westermarck, *Christianity and Morals*, p. 93.

¹⁰⁴ Earle, *loc. cit.*, p. 248.

¹⁰⁵ *Loc. cit.*, p. 249 and T. J. Wertenbaker, *The Puritan Oligarchy*, New York, 1947, pp. 160-162, 171-172.

In accordance with the spirit of the traditional *Hadran* it will be my final, and I trust, not unsuccessful, errand this evening to establish the intimate relationship between the conclusion and the commencement¹⁰⁶ of the *שמונה עשרה*. The Aggadic perorations of R. Joshua ben Levi and R. Simon b. Halafta are later glosses since they are wanting in the MSS. Hence, the Mishnah actually terminated with the rule:^{106a} *חלות דבש מאימתי משמאות משום משקה*. However, we deem it more expedient to base our exposition on the passage previous to the last, and not without adequate Talmudic precedent, for the rabbis too have availed themselves of the exegetical principle *מקרא נדרש לפניו*, which may be extended not irreverently to the Mishnah. This passage reads: *כזרת דבורים... ר' אליעזר אומר: הרודה ממנו בשבת חייב חטאת... וחכמים אומרים הרודה ממנו בשבת פטור*.

R. Eliezer said: If one extracts honey from a beehive on the Sabbath, he is liable for a sin offering; the majority of the scholars exempt such a person from that penalty.

The Tosefta Berakot opens with the following rule: *מאימתי קורין את שמע בערבין משעה שבני אדם נכנסין לאכול פיתן בלילי שבתות*. דברי ר' מאיר.

Now it would be both rash and erroneous to conclude that in the conjunction of these two passages, there is masked a Tannaitic obsession for nutriment and to infer, if you permit me to employ the well-known *bon mot*, that *Bauch Judentum ist auch Judentum*.

I am prone to submit that a natural construction of these two passages will evince little more than a slender thread linking them

¹⁰⁶ Cf. Hayyim Palagi, חיים חכילה, Salonica, 1845, who attempted to link in a hundred and one different ways the first and last verse of the Pentateuch, and R. Joseph Alashkar in the introduction to his *ענף זמנא* refers to this custom at a Siyyum of finding a connection between the end of one treatise and the beginning of the next, cf. Assaf, *מקורות לחולדות החינוך בישראל*, III, p. 11, and Abraham Lipman, in his *חומה*, עיר, Frankfurt a/Oder, 1719, who explains the connection between the end of each treatise with the beginning of the next. For a *Hadran* in Spanish on the occasion of a *Siyyum* on the treatise of Betsah, cf. *Discursos Sagrados que recitaron en la Hesnoga del K. K. de Pisa los Discipulos del. Exc. Senor H. R. Raphael Meldola... la Celebridad de* *que terminaron la lectura del Tractato de טוב*, Venice, 1714.

^{106a} Cf. Savitsky, *Beth Mordecai*, I, 1944, pp. 1 ff.

together. However, a recondite interpretation will disclose the presence of a close affinity in thought. Should you regard the esoteric approach to the oral law to be awry, then let me point out that no less an halakic authority than our ancient royal warrior, King David, had recourse to it. Truth to say, this style of treatment of the law did not appeal to the fancy of his rival, King Saul. For we read *שואל לא גלי מסכתא דוד גלי מסכתא* ('Erubin 53a).^{106b} Now what does *גלי* signify?^{106c} The usual explanations do not satisfy, *גלי מסכתא* לפי ענין דעתי, the term *גלי* denotes the revelation of the mysterious significance of the text. The term *גלי* was borrowed from the Psalmist, who prayed for insight into the wondrous things of the law, *גל עיני ואביטה נפלאות מתורתך*. When R. Meir and R. Nathan tried to embarrass R. Simon b. Gamaliel, they asked him to interpret Mishnah Uktsin in their way, *ניהא ליה דגלי עוקצין דלית ליה* (Horayot 13b).

Rabina observed that the influence of the teachings of the Judaeen scholars was enduring, in contrast to the sway of their Galilean colleagues, which was transitory. This he attributed to the fact that the former endeavored to search out the deeply imbedded meaning of the oral tradition, while the latter did not. *בני יהודה דגלי מסכתא נחקיימה תורתן בידם בני גליל דלא גלי מסכתא לא נחקיימה תורתן בידן*.

Armed with royal and Talmudic precedent, we shall now proceed to uncover the spiritual significance of the secret bond between the two passages, and note its relevance for us rabbis and scholars in this clime and time.

The phrase *כוורת דבש*, is an obvious metaphor for Torah, which had been compared to honey already by the Psalmist *מתוקים מדבש ונופת צופים* (cf. Sifre, Deut. 48), and the rabbis employed the same simile which they read into the verse. *דבש וחלב תחת לשוניך* (Cant. 4.11 and Canticles Rabbah I.14; cf. also Deuteronomy Rabbah 7.3). R. Joseph

^{106b} Cf. Rashi to Gittin 59a, s. v. *שואל* who remarks *אלא היה בחורה היה שואל* who remarks *שלא לימר לאחרים*.

^{106c} For *גלי* to interpret, cf. also Hagigah 11b, where the verse *לא תקרבו לגלות מעמי מרשות עריות* is taken to mean *לגלות* as Rashi put it, and in a Geonic text we read *מסכתא דכלא ומגלים עור מסכתא אחרת* (Schechter, *Saadyana*, p. 118), cf. R. Nissim to Shabbat 47a.

based his refusal to impart the knowledge of the מעשה מרכבה to the elders of Pumpedita upon this same passage, to which he gave this curious turn חת לשוניך יהו חלב וחלב יהו חת לשוניך (Hagigah 13a). Let us return to our honey, that precipitated the conflict between R. Eliezer and the scholars. We shall note only the notions of the latter inasmuch as כרבים הלכה כרבים. In line with the occult interpretation, that honey is a figure of speech for Torah, I fancy this passage to mean that a homilist on the Sabbath, may consecrate his prowess of address to a sweet and soothing discourse, that is pleasing to the mind and feelings, and agreeable to the taste as honey.

This self-same thought is more forcefully and artfully urged by R. Jose in his annotations upon the phrase נופת חטופנה כל מי שאומר דברי תורה ברבים ואין שפתותיו כלה עריבין על שומעיהן כדבש זה שבא מצוף נוח לו שלא אמרן (Canticles Rabbah IV.22).

However, while a homily should be sweet as honey, it should not be too mellifluous. ¹⁰⁷אכל דבש הרבות לא טוב (Prov. 25.27) is the caution of the wise. Ben Azzai was singled out as a perfect example of a preacher whose discourse was dulcet in proper proportions. Commenting upon the adage דבש מצאת אכול דין (Prov. 25.16), the Midrash points out ¹⁰⁸זה בן עזאי. Little wonder that Abaye and Raba would utter with no little satisfaction ¹⁰⁹הריני כבן עזאי בשוקי טבריה, or the Palestinian R. Yoḥanan gave way to self-praise ¹¹⁰אנא בן עזאי דהכא when he had performed an eloquent דרשה (cf. Kiddushin 20a, 'Arakin 30b, Sotah 45a, Y. Bikkurim II.2). Thus it is evident that the Mishnah, albeit in a veiled manner, closes upon a homiletic note, a fact not without significance for rabbis.

While we are in this mood, let us consider the first passage of the Tosefta נסתר נסתר על דרך. The text reads: מאימתי קורין שמע.

¹⁰⁷ Abraham Gavison in עומר השכחה, Leghorn, 1748, 86a, refers this verse to המתעסקים בפילוסופיה כמורה הנבוכים וחכמת ההגיון וכדומה, whereas he applies the statement ¹⁰⁸המתעסקים בקבלה ובוהר to דבש מצאת אכול דין. Homer speaking of Nestor says, "Speech sweeter than honey flowed from his tongue", *Iliad* I, 249. Cf. also Lucretius, *De Rerum Natura*, I, 1947. Claudius Aelianus, the celebrated author of *On the Nature of Animals* knew Greek so well that he was called ¹⁰⁹μελιγλωσσος.

בערבין משעה שבני אדם נכנסין לאכול פיתן בערבי שבתות. The key words *כל משען לחם אלו בעלי תלמוד שנאמר לכו אדם נכנסין לאכול פיתן* manifestly denote students poring over the Talmud, as we read *לכו אלו בעלי תלמוד שנאמר לכו אדם נכנסין לאכול פיתן* (Hagigah 14a). This hypothesis is substantially strengthened in plausibility by the parallel passage in the Babli which reads as follows: *מאימתי קורין שמע בערבין משהעני נכנס לאכול פתו במלח בני אדם* which is substituted for *בני אדם*, stands for poor Talmudic students. As R. Zera reported in the name of Rab, *כל ימי עני רעים אלו בעלי התלמוד* (Sanhedrin 100b), and the commentator explained that the epithet poor was not meant to describe their poverty, but their trials and tribulations in grasping the sense of the Talmudic discussions *ברוב שקשה להם ללמוד*.

קשיות וסוגיות שיש בו. Now you may insinuate, if the Mishnah alluded to the studying of the Talmud, then why does it mention *שבתות בערב*? Is there not a positive Biblical precept *והגית בו יומם ולילה*? This uneasiness may be brushed aside by a correct understanding of *ערבי שבתות*, which in this context signifies *עולם הזה*. For this meaning of *ערבי שבת* may I cite the passage *מי שטרח בערב שבת יאכל בשבת* (Abodah Zarah 3a), and Rashi explicitly says, *ערב שבת*, is a metaphor for *עולם הזה*, and *שבת* refers to *שבת ומנוחה* (Sanhedrin 97a).

Should you be disposed to inquire further: What is the association between the time for reading the Shema and learning the Talmud? Then let us first fathom the meaning of *קורין*. Reading implies more than the inaudible or audible utterance of the syllables and words of the Shema. It involves the discovery and awareness of the deeper sense and latent force of this prayer. As the Mishnah says: *אם כיון לבו יצא*. Only if one has applied his heart and directed his mind to ascertain and scrutinize its meaning does one fulfill the *מצוה* of reading the Shema.

The Mishnah, accordingly, conveys the following thought: We shall penetrate into the real purport of the Shema when there are scholars in our midst who are familiar with the Talmud, to whom we can turn for an explanation of its meaning. In very deed, the question is raised in the Yerushalmi (Berakot I.5) *מפני מה קורין שתי פרשיות הללו בכל יום*. What profound connotation does the Shema possess that we are required to read it every day?

To which R. Levi replied בהן כלולין because there is an allusion in it to each of the Ten Commandments.¹⁰⁸ It is this which vouchsafes to the Shema its great significance.

To grasp the full force and sense of all the tenets and rites of Judaism in all of its facets nothing less than a comprehensive knowledge of the Talmud will be sufficient. The members of this Assembly, being conscious of this fact, have instituted the regular study of Talmud among themselves, with the annual Siyyum, which augurs well for the future of traditional Judaism in this country.

Briefly to recapitulate, while the paragraph with which the Mishnah ends instills in us the idea that the end of preaching is sweetness with moderation, the passage with which the Tosefta begins distills the thought that the study of the Talmud is the beginning of wisdom ראשית חכמה קנה חכמה (Prov. 4.7, Y. Horayot III, end). If I may conclude with an extract of a prayer usually recited at a Siyyum:

יהי רצון מלפניך ד' אלהינו כשם שעזרתנו לסיים מסכתות אלו כן תעזרנו להתחיל מסכתות אחרים ולסיימם ללמוד וללמד ולקיים את כל דברי תלמוד חורתיך באהבה. ה' עז¹⁰⁹ לעמו יתן ה' יברך את עמו בשלום.

¹⁰⁸ Cf. Ginzberg, *Legends of the Jews*, VI.50, and Revel, *Karaite Halakah*, p. 80, note 130.

¹⁰⁹ On עז as Torah, cf. Zebahim 116a and Targum to Ps. 29.11, Midrash Canticles to I.4 and II.3; Midrash Tehillim to Ps. 28.6 (ed. Buber, p. 230) and parallels cited by the עינים יפה to Zebahim 116a and Leviticus Rabbah 31.5. R. Shimshon b. Zadok remarks מתן תורה עז בשביל מתן תורה נקרת עז שנאמר ה' עז לעמו יתן (חשבץ, No. 245). Cf. also *Mishnat R. Eliezer*, ed. Enelow, p. 309.

THE RESPNSUM OF MAIMONIDES CONCERNING MUSIC*

The Jews in Islamic countries were profoundly influenced by the habits and thoughts of their Moslem contemporaries. It is but natural that Arabic music which was irresistible in its appeal should have made its way into Jewish homes and even exercised a spell over the Jewish precentors. Long before the time of Maimonides, Jews were not only familiar with Arabic melodies, but cultivated their music with great enthusiasm. A pious soul, much alarmed at the infiltration of foreign airs into Jewish social life, and nonplused as to the permissibility of listening to music in general, addressed an inquiry to Moses Maimonides on this subject. Before giving an analysis of Maimonides' reply we deem it best to present a succinct historical survey of the earlier Jewish law concerning music, for Maimonides was mostly guided in the decision he gave by rabbinic precedent.

It is unnecessary to expatiate here upon the tremendous role music played in the life of the Jews in Biblical times. Not only in the Temple worship but in private life, music and songs were of great significance. However, the overwhelming national calamity that overtook Judaea in 70 C. E. cast a shadow of deep gloom upon the people, and as a token of mourning, they voluntarily refrained from listening to the strains of music. Thus we read that with the abolition of the Sanhedrin, there was not any music at banquets¹ — most likely wedding feasts² are meant

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¹ Mishnah Sotah IX:11, Tosefta, XIII:7. According to Halevy, דורות הראשונים, I, c. 62 ff., the Mishnah refers to the year 57 C. E. when the Central Sanhedrin lost its supreme authority due to the measures taken by the Roman General Gabinius. This view is combatted by Hoffmann in *Jahrbuch der Juedisch-Literarischen Gesellschaft*, V, 1907, pp. 225 ff., cf. also Leviticus Rabbah XIX:5.

² So also Meiri in his commentary to Sotah 48a.

here — for they constituted the most important public functions in early times. There is no question of a rabbinical decree prohibiting music,³ but the people weighed down by the great catastrophe were in no mood to celebrate joyful occasions with song. How long this aversion to music lasted in Palestine and to what extent it pervaded the nation, it is difficult to ascertain.

In Amoraic times, especially in Babylonia, the custom to abstain from music found little favor among the populace. Living long after the national tragedy and far from its scene, these Jews could no longer experience the emotions of their forebears who bore in their hearts the bitter memory of the sad event. The rabbis, though conscious of the historical origin⁴ of the custom to refrain from music, made vain and desperate efforts to proscribe it for another reason. It seems that the life of comparative ease and prosperity of the Jews in Babylonia, predisposed the people to a life of gayety and merriment. The Amoraim sought to curb music as it led to unseemly frivolity,^{4a} especially at banquets, where wine was served, for it introduced there a spirit of levity. The matter became even more grave when women were the musicians, as was mostly the case in the Orient. In short, the rabbis were bent on counter-acting the odious consequences of wine, women and song. This seems to be the burden of the rabbinic outpourings upon the subject in the Talmud.

Thus Rab imprecated evil upon any one who listened to song. R. Huna interdicted music at all social functions. As a result of this decree, parties became infrequent and brought on swift

³ According to Mishnah Pesahim X:8 one may not conclude the Passover meal with *אשקוטן*, i. e. music, according to one interpretation in Y. Pesahim X:6; perhaps because it might introduce a note of excessive gayety that would mar the solemnity of the festival, cf. Loew, *Lebensalter*, p. 318, and *Jeschurun*, V, 176–8, and Werner, *HUCA*, XX (1947), 415, and Lieberman, *הירושלמי כפשוטו*, Jerusalem, 1935, p. 521.

⁴ R. Huna said that whenever a calamity befell the community, it would renounce certain forms of enjoyment, and when the Sanhedrin ceased to function, music was suppressed at banquets; Y. Sotah IX:12, Ekah Rabbah to V:14.

^{4a} Cf. Philo, *De Specialibus Legibus*, II, 193.

economic repercussions. The cost of ducks fell so low that one could purchase a hundred of them for a zuz, and a hundred measures of wheat for the same price. On the other hand, he saw nothing wrong in the carols of boatmen⁵ and ploughmen⁶ because they were thereby stimulated to do their work more efficiently. He, however, was strongly opposed to the songs of the tanners⁷ since they were of a lascivious character and predisposed men to carnal thoughts.

R. Hisda realized as fully as his colleague R. Huna the moral dangers⁸ consequent upon the indulgence in song, but for practical and economic reasons lifted the ban on music at convivial gatherings, and immediately the price of ducks soared so high that one could not be procured for a zuz.

In some circles the notion obtained that only instrumental music was provocative, and in inquiry was sent to Mar Ukba concerning the legal status of vocal music. The exilarch responded in an emphatic tone that the rabbis proscribed both kinds of entertainment.⁹ Similarly, we are informed that "vocal music has always been more keenly appreciated by the Arabs than purely instrumental music. Their ardent taste for poetry determined this to some extent, although the pressure of legal opinion

⁵ For the songs of the Nile boatmen, cf. Buecher, *Arbeit und Rhythmus*, pp. 427 ff.

⁶ Cf. also Leitner, *Der Gottesdienstliche Volksgesang im juedischen und christlichen Altertum*, Freiburg in B., 1906, p. 23. For the "hida" song of the Arabian camel driver, see Huart, *A History of Arabic Literature*, p. 5.

⁷ Our texts have "weavers," but it seems that the reading of R. Hai Gaon (Lewin, גווי קדם V:34) and the ערוך is the original one. For tanners were largely recruited from the lowest ranks of society, because of the nature of the work, cf. Kiddushin 82b.

⁸ In Y., *loc. cit.*, R. Hisda states that while the Sanhedrin exercised its power it censored lewd songs, but after this high tribunal lost its authority, licentious songs became common. R. Hisda's remark may also be construed as an explanation of the Mishnah (as Meiri believes), and means as follows: Originally when the Jewish Court was functioning, music was allowed because there was an authority to prevent its abuse, but now, that is gone the people would indulge in indecent songs with no one to check them if it were permitted.

⁹ Gittin 7a; Y. Megillah III:74a; Lieberman, *REJ*, 97:53, and Midrash ha-Gadol to Exodus, ed. Hoffmann, p. 112.

which frowned on instrumental music (*per se*) also contributed to the preference."¹⁰

R. Joseph¹¹ looked askance upon parties where both sexes took part in song. When the singing was done by the men, and the women merely joined in the chorus, there lurked the danger of frivolity, but when women sang and the men chimed in, then the passions would be inflamed as fire ravages flax.¹² Raba seemed unable to stem the popular tide in favor of music and invoked Divine punishment upon those who yielded to the lure of song.

In Palestine during the Amoraic period, the unhappy conditions of the Jews deterred them for the most part, from social merriment and jollity, and consequently we find only a single rabbinic pronouncement upon this subject. R. Joḥanan¹³ states that it is disallowed to drink wine to the accompaniment of the four musical instruments mentioned in Isa. 5.12, namely: the harp, the psaltery, the tabret, and the pipe.

In Geonic times, too, it seems that the masses considered the proscription of music a great hardship and sought a mitigation of the severity of the law. But the Geonim not only interpreted the law strictly, but applied sanctions to the transgressors. In only one instance did they make a concession, i. e., when they permitted music at a wedding because it was considered a religious event. Thus R. Moses Gaon of Sura in 832 upheld the Talmudic view that both song and instrumental music are forbidden. He disqualified a person from acting as a witness if he

¹⁰ Farmer in *Legacy of Islam*, Oxford, 1931, p. 358, and D. S. Margoliouth, *Mohammedanism*, p. 132, cf. also references cited by T. W. Juynboll, *Handbuch des islamischen Gesetzes*, 1910, p. 168, note 3, and A. Mez, *The Renaissance of Islam*, London, 1937, pp. 336-339.

¹¹ In כפתור ופרח, ed. Luncz, Jerusalem, 1897, p. 111, the reading is Rab.

¹² Sanh. 37a: "He who sings secular songs with women will be metamorphosed after death into oxen," cf. Recanati, באור על החזרה, Venice 214b (כי חצא) cited by Gudemann, *Geschichte des Erziehungswesens*, II, 180, note 6.

¹³ In our texts as in נגוי קדם V:34, the reading is R. Yoḥanan, but in Assaf, תשובות הגאונים, II, no. 193, the statement is transmitted by R. Samuel b. Naḥmani in the name of R. Jonathan. It is difficult to decide which is the original reading in view of the fact that Samuel b. Naḥmani transmitted teachings in the name of both Amoraim.

was engaged as a musician knowing that he was violating the law against playing music.¹³ In reply to another question concerning instrumental music, Saadia declared that the law applied to all musical instruments, but that Scripture mentions only four, inasmuch as these were the most important.¹⁴

From R. Hai we have two responsa concerning music. One was sent to Cabas,¹⁵ and the other to Kairwan,¹⁶ towns in Northern Africa.¹⁷ In both replies, he stresses the fact that as a general rule, singing and playing on any kind of instrument are prohibited. To the scholars of Cabas he writes that any one who drinks wine at a place where instrumental music is being played, and especially in the company of Gentiles, is subject to excommunication. An exception may be made only in the case of a person who is in government employ and who looks after the interests of his co-religionists. He may listen to music merely out of respect for the king, but not with the intention of amusing himself, for he may not forget the destruction of the Temple. For the last two hundred years, there were Jewish officials in the government and the rabbis permitted them to listen to music, just as Nehemiah, who was cupbearer to the king, must have attended the royal entertainments. However, if this privilege were abused, then it would be withdrawn.

In his responsum to the scholars of Kairwan,^{17a} R. Hai dealt mainly with the rules concerning music at weddings. In view of the fact that the Talmud prescribes that the newly married be entertained at the wedding feast^{17b} the question arose as to whether that rule would not be in conflict with the law inter-

¹³ Assaf, חשבוות הנאונים, 1, 1927, no. 21.

¹⁴ Lewin, גנוי קדם, V:34, note 8.

¹⁵ Published by Lewin in גנוי קדם, V:58–59.

¹⁶ First published by Harkavy, חשבוות הנאונים, no. 60, then by Assaf, חשבוות הנאונים, II, Jerusalem, 1929, no. 193, and in more complete form by Lewin, גנוי קדם, V:33–35.

¹⁷ Mann, *J. Q. R.*, New Series, VII, 482–484.

^{17a} Cf. the Geonic quotation in חולדות אדם וחוה, 22.2, ed. Venice, 1553, 186c, and Lewin, אוצר הנאונים, to Gittin, part I, pp. 8–11.

^{17b} Cf. Goitein, *Jemenica*, p. 104, n. 723, where it is stated that in Yemen only married women or widows are permitted to act as musicians.

dicting all music. Therefore R. Hai stated that it is the custom at banquets, not to mention wedding feasts, to sing hymns of praise to God, and songs felicitating the newly weds and similar salutations, but the singing of Arabic love songs was absolutely forbidden.

It was the custom in Kairwan to have women play the tambourine and perform dances at weddings,^{17c} as well as to hire Gentiles to play on various stringed instruments. R. Hai condemned this practice as odious as it might lead to lewdness. He did not look with favor upon the custom for women to play the tambourine and to perform dances even while the bride was adorning herself. But at the banquet proper he would absolutely forbid it. In a brief responsum of another Gaon it is explained that the prohibition in the Talmud referred merely to listening to non-Hebrew songs, whether they be accompanied by music or not, and this applied equally to a cantor who sang Arabic songs.¹⁸

^{17c} Berakot 6b. In Biblical times it was customary to sing wedding songs during the wedding procession, but no specific term is found in Hebrew for wedding song. It may be surmised that the term קול חתן וקול כלה means not the voice of the bridegroom and the bride but the voice in the praise of the bride and bridegroom, cf. Jer. 7.34, 16.9, 25.10, 33.11. In Berakot 6b, R. Huna explains this phrase to mean, to gladden the bridegroom and bride at the wedding feast, cf. R. Samuel Edels on this passage, who connects it with one of the seven nuptial benedictions in Ketubot 8a. In M. Ketubot II.1 it is stated that at the wedding of a virgin, she marches בְּהִינוּמָא, that is, to the accompaniment of the marriage lay, cf. also I Macc. 9.37. Sachs (*Beiträge zur Sprach- und Alterthumsforschung*, I, 1852, p. 83) was the first to suggest that הִינוּמָא might be the Greek *ὑμεναῖα*. For a host of interpretations of הִינוּמָא see Petuchowski in his notes to M. Ket. II.1, ed. Berlin, 1919, pp. 100–101. At a Greek wedding, too, the bride was accompanied from her father's house to that of the bridegroom with the music of cithars, flutes, and wedding songs (*ὑμεναῖον*) sung by the bride's attendants, cf. Hermann-Blümner, *Lehrbuch der Griechischen Privatalterthümer*, 1882, p. 273, note 4. For flutes at a Roman wedding, cf. Marquardt, *Das Privatleben der Römer*, 1886, p. 54, note 1, and Blümner, *Die Römischen Privataltertümer*, 1911, p. 358, note 7. Cf. also *Eben ha-Ezer*, 64.4, *Be'er Heteb*, note 7.

¹⁸ שְׁעָרֵי חֲשׁוּבָה, no. 152. In a Manuscript collection known to Israel Moses Hazan this responsum is given in the name of R. Ḥananel, see his commentary *הים*, p. 60a.

The view of R. Hai as expressed in his responsum to the scholars of Kairwan was accepted by R. Isaac Alfasi. He incorporated it in his compendium of the Talmud¹⁹ and it has largely determined the attitude taken towards music by the subsequent codifiers. In spite of the legal prohibition it seems that Arabic songs were popular among the masses, for an inquiry was sent to Alfasi concerning a reader of prayer (חזן הכנסת)^{19a} who was in the habit of indulging in the chanting of airs borrowed from the Moslems. The learned rabbi responded²⁰ that if the precentor (שליח ציבור) persisted in his stubborn ways, he should be deposed from his office, quoting Jer. 12.8^{20a} to substantiate his view: "She hath sung her melodies (i. e. of the foreigners) against Me, therefore have I hated her." We learn that a certain early Spanish Jew, called Aben Sacbel^{20b} wrote songs for dancing.²¹

Law cannot arrest the operation of human instincts, and so the rigid rabbinical proscription of music at social parties and non-religious functions must have encountered vigorous opposition and thus this question came up before Maimonides after he composed his great Code and the philosophical Guide. In the *Mishneh Torah*²² he had briefly epitomized the view of Alfasi and stressed the historical origin of the law which sought to keep alive among the people the memory of the great national tragedy. Now when he was not dealing with a theoretical point of the law, but had to cope with widespread disregard of this rule, and feared

¹⁹ Berakot, Chapter V, beginning, cf. also ראבי"ה, ed. Aptowitzer, Vol. I, p. 69.

^{19a} For the difference between *Hazan* and *Sheliah Tsibur*, cf. Mann, *J.Q.R.* N. S., X, 363.

²⁰ Responsa of Alfasi, no. 281, cf. ed. Leiter, p. 146, note 2. It is quoted in the כל בו, ed. Venice, p. 155b, and by R. David ibn Zimra in his Responsa, ed. Venice, no. 809, and was known to Archevolti, ערוות הבשם.

^{20a} In Ta'anit 16b this verse is quoted with reference to זה שליח צבור שאינו רגון.

^{20b} Perhaps this is Solomon בן ציקבאל mentioned by Harizi, Makamat 3, (ed. Lagarde, p. 23, line 47, ed. Kaminka, p. 41, bottom). For צקבל, cf. also Graetz, *Geschichte der Juden*, VI, 112, note 1, and Schorr, החליץ, III, 154-158.

²¹ Cf. J. B. Trend, "The Moors in Spanish Music," in *Criterion*, London, 1923-4, Vol. II, p. 210.

²² הלכות תענית, V:14.

regale of wine. Consequently Maimonides would prohibit not only Arabic but also Hebrew songs,²⁹ if their contents were such as to lead to excitement and debauchery. He found an allusion in Amos 6.5 to the disapproval³⁰ of playing on instruments merely for the sake of pleasure, when the prophet castigates those "who thrum on the psaltery, that devise for themselves instruments of music, like David."³¹ *En passant*, it may be remarked that this verse is not cited by any of the codifiers in this connection. This statement of Amos was undoubtedly suggested to Maimonides by the Midrash.³²

The purpose of the law was that Israel should become a "holy nation," and therefore it forbade all acts that did not lead to moral excellence, and discouraged idle amusement and dalliance. The Geonim permitted, he goes on to say, hymns and praise³³ of

it is not permitted to say anything holy while listening to the singing of women, but since we dwell among the Gentiles we cannot obey the strict letter of this law, and do not refrain from studying even while hearing the songs of Gentile women," cf. *Mordecai* to Berakot, no. 80. For קול באשה ערוה, cf. Palagi, כל החיים, Smyrna, 1877, p. 12a. For the prohibition of female singing in the early church, cf. Werner, *H. U. C. A.*, XX (1947), 433, note 75. The statement ערוה באשה קול is literally translated into Arabic in the *Mufid al-Ulum*, ed. Cairo, 1310, A. H., p. 31, cited by Goldziher, *J. E.*, VI, 134.

²⁹ In opposition to the view of the Gaon found in שערי חסובה, no. 152.

³⁰ The word אֱלֵעֲבָאֲרָה in *M. G. W. J.*, *loc. cit.*, p. 177, line 4, which Goldziher left untranslated, signifies "the people" and the meaning of the sentence is as follows. The prophets objected to the people playing musical instruments for their entertainment (literally, for listening to them). Geiger's emendation in *Juedische Zeitschrift*, XI, p. 167, to אֱלֵעֲבָאֲרָה is accordingly unnecessary. Schmiedl's translation in Freimann, *loc. cit.*, p. 338, line 14, רִיל שְׁמִיעָם לַחֲלִיל, is meaningless.

³¹ Cf. Caspi, *ad loc.*, in אדני כסף, ed. Last, London, 1912. In our Targum, *ad loc.*, the reading is דַּמְנָן, but in quotations in Yemenite MSS., the reading is דַּמְנָן, that is, to count.

³² In Leviticus Rabbah V:3, there is a play on the Hebrew word "nebel" which means "psaltery, wine bottle, and obscenity," דַּבְרֵי נְבִילוֹת.

³³ Cf. also Lactantius, *Of Justice*, VI:21, "Let nothing be agreeable to the hearing but that which nourishes the soul, and makes you a better man. Therefore if it be a pleasure to hear melodies and songs, let it be pleasant to sing and hear the praises of God." Cf. also Pesaḥim 107a, in reference to singing praises of God over wine. Cf. also Altmann, *M. G. W. J.*, 80; 307, note 9.

God, but it never occurred to them to interdict any song that contained nothing unseemly.³⁴ It is thus quite clear that the strict view adopted by Maimonides in going so far as he could in proscribing music was not merely because he took a mere legal view of the matter, but because in the ancient Orient music was furnished largely by women, and the songs were often too prone to kindle the passions. Thus the Moslem jurists wrote many responsa³⁵ prohibiting music, but their views did not influence the Arabs to any considerable extent. For not only did music play an important part in their life, but they also wrote numerous treatises on the theory of music.³⁶

The responsum of Maimonides on Music seemed to have exercised little influence upon subsequent authorities, if one may infer from the fact that only R. Jacob b. Asher cites it. The attitude taken by some European rabbis subsequent to Maimonides was much more liberal, most likely due to the different

³⁴ Schmiedl's translation in Freimann, *loc. cit.*, p. 339, line 7, דבר מנוה בהא, makes no sense. In accordance with the original it should read דבר שאינו מנוה.

³⁵ Mohammed al-Damuni discussed this question at great length, cf. Goldziher, *loc. cit.*, p. 176, note 1. Cf. also Farmer, *loc. cit.*, pp. 1, 6, 20–21. Farmer, *loc. cit.*, p. 21 remarks: "In his *Shemone pera'igim*, Maimonides deals with the "partitions" which prevent man from comprehending God. Only those who attained the ranks of the prophets could pass these "partitions" and the greater the prophet, he says, the fewer the "partitions." Al-Ghazali believed that these "veils" as another *Sufi* calls them, could only be lifted when man attained the supreme stage of ecstasy of the soul, and this rapture, he says, was reached by listening to music and singing. For the Moslem attitude towards music, cf. also Robson, *Tracts on Listening to Music*, 1938, and Farmer, *Music, The Priceless Jewel*, 1942.

³⁶ Cf. Farmer, *History of Arabian Music*, London, 1929, and his article "Musiki," in the *Encyclopedia of Islam*. It is strange that exceedingly little has been written in Hebrew on the theory of music, cf. Steinschneider, *Hebraeische Uebersetzungen*, p. 855; Birnbaum, *Juedischer Kantor*, V, 1883, p. 334, and Farmer, in *Legacy of Islam*, pp. 369–370, and מאורז הספרות, vol. 1, pp. XXIX–XXXII. According to קורא הדורות, ed. Lemberg 55b, Israel Abba, (the brother-in-law of Mordecai Kalai) who was a great Talmudist, was versed in the theory of music. Cf. also E. Werner and I. Sonne, "The Philosophy and Theory of Music in Judeo-Arabic Literature," in *H. U. C. A.* XVI (1941), 251–319, XVII (1942–3), 511–573, and Farmer, *Saadyah Gaon on the Influence of Music*, London, 1943, pp. 1–2.

conditions under which they lived. Thus R. Joel b. Eliezer ha-Levi, a German scholar of the twelfth-thirteenth century permitted a Jew to order Gentiles on the Sabbath to play instrumental music at a wedding party, for there can be no festivity without music, and its prohibition on the Sabbath is merely a rabbinic ordinance (מורה) which may be disregarded at the celebration of a wedding which is a religious duty (מצוה).³⁷ In the Provence in the thirteenth century there was a group of liberal scholars who permitted the playing of all kinds of stringed instruments upon the Sabbath on the ground that the Talmud only forbids clapping the hands³⁸ and striking the hands upon the thigh, to keep in tune with singing as that makes a loud noise. Meiri objected vigorously to this view, as it was a false interpretation of Talmudic law.³⁹

How indispensable music at weddings was considered in some European countries may be illustrated from the following incident that occurred at the beginning of the fifteenth century. In one of the German states the wife of the Prince died and a year of mourning was declared, during which period music was forbidden. At that time a wedding was to have taken place in the locality. The people, perplexed as to the propriety of celebrating a Jewish wedding without music, sent an inquiry to R. Jacob Mollin as to how to proceed. The rabbi replied in very definite terms that music was absolutely essential at a wedding and advised them to perform the ceremony elsewhere. Consequently they went

³⁷ Quoted in *Mordecai*, Bezah, 696. The opinion of the ראב"ה was a natural development of the Geonic view which was lenient in regard to weddings. Cf. also *Tosafot*, Gittin 7a, s. נ. וסרה, where wedding songs are termed שיר של מצוה. This view of the ראב"ה was not accepted by R. Jacob ben Asher (טור, אורח חיים, 560) nor by R. David ibn Zimra, Responsa I, no. 132, who remarks that in Egypt, Palestine and Damascus, vocal music constituted the principle entertainment at weddings. The views of the ראב"ה were incorporated in the *Shulhan Aruk*, אורח חיים, 338.2.

³⁸ Isaiah di Trani, the younger, an Italian scholar of the fourteenth century says that while it is forbidden to produce music on the Sabbath by hand or by means of instruments, it is permitted to call one's fellow by whistling a tune, since the primary purpose is not to sing the melody, but to reach his friend. *to Alfasi 'Erubin end*. שלטי הגבורים

³⁹ מנן אבות, London, 1909, p. 49.

from Eppenstein to Mayence in order to comply with the rabbi's decision.⁴⁰

In early times in Europe, the Jew became familiar with the airs of the minnesingers and troubadours,⁴¹ and did not hesitate to use these melodies for cradle songs and even to adapt them for religious purposes. As a protest to this prevalent custom, a strict warning was issued by R. Judah he-Ḥasid, a German of the twelfth-thirteenth century. He admonished his co-religionists not to sing Gentile songs or Jewish religious melodies to an infant in order to stop it from crying. However, one may chant in order to quiet it, passages from the Bible or Talmud which one wishes to memorize. Neither is it permitted to sing beautiful melodies to a Gentile for he may appropriate them for his religious services, nor is it permitted to introduce ecclesiastical airs into the synagogue.⁴²

Strangely enough, it was a Polish Talmudist, R. Joel Sirkes, of the sixteenth-seventeenth century, who permitted the use of Gentile melodies which were not chanted in their houses of worship, for synagogal purposes.⁴³ At the same period the Italian grammarian Samuel Archevolti was protesting against the practice of the cantors of his time who were singing the holy prayers to the tunes of secular and popular airs.⁴⁴ The oriental

⁴⁰ Maharil, הלכות ערובי חצרות, ed. 1858, p. 84. Cf. also I. Abrahams, *Jewish Life in the Middle Ages*, 1896, pp. 197 and 374, and I. Rivkind, in מנחה ליהודה, Jerusalem, 1950, p. 249, note 1, and p. 254, note 19.

⁴¹ Simon Duran informs us that the Jews in Spain borrowed melodies from the Arabs, and in France from the troubadours, מן אבות, Leghorn, 1785, p. 55b, cf. Ackermann in Winter und Wuensche, *Juedische Literatur*, III, 512–513. Secular songs were interpolated into grace after meals and were set to Arabian tunes in Portugal in the fourteenth century, cf. Alami, אנרת מוסר, Vienna, 1872, pp. 10–11.

⁴² ספר חסידים, ed. Warsaw, no. 238.

⁴³ Responsa 127, cf. Palache in *Bijdragen en Mededeelingen van het Genootschap voor de Joodsche Wetenschap in Nederland*, III, 1925, p. 69.

⁴⁴ ערוות הבשם, ed. Venice, 1602, p. 110b. In the year 1605 his disciple Leon of Modena wrote a responsum to quiet some strict pietists who objected to the singing of hymns in the synagogue which they thought should be merely recited. For the editions of the responsum, cf. the writer's החשובות, p. 92, no. 994, and p. 209, no. 994.

poet Israel Najara composed many poems and hymns which were to be sung to the melodies of Arabic and Turkish songs. It was a younger contemporary of his, Menahem Lonzano, who criticized him severely, not so much on account of the foreign melodies, for he himself showed a marked preference for Arabic tunes, but because certain of his hymns which celebrated God's relationship to Israel were set to the tunes of the most sensuous love songs.⁴⁵

In the eighteenth century, Menahem Navarra⁴⁶ of Verona informs us that it was a recent custom in his city to recite the קדיש, the קדושה and the תפילה to the melodies of well-known love songs and dance tunes. Those who were responsible for this innovation cited the authority of R. Joel Sirkes. Navarra, on the other hand, was inclined to side with his countryman Arch-evolti, who strenuously opposed such practices, but was unable to decide between the conflicting opinions, and consequently he turned to his kinsman R. Masud Hai ben Aaron Rokeah for his opinion. The latter, in a lengthy responsum⁴⁷ discusses the whole question and points out that the view of R. Joel Sirkes was misunderstood and that the introduction of foreign tunes in the synagogue was absolutely forbidden.

A remarkably liberal view, on the other hand, on this subject was held by R. Israel Moses Hazan, an Italian rabbi of the nineteenth century. In one of his responsa⁴⁸ he informs us that when he was in Smyrna he met some of the most renowned scholars and cantors of that city, at the head of whom was Abraham Cohen Arias. When they were in need of fitting tunes for Rosh ha-Shanah, they would frequent Christian churches in order to learn those melodies which invoked in the congregation a spirit of humility, and they adapted them in a marvellous manner to to the קדיש and the קדושה. He sought to justify this practice by

⁴⁵ שתי ידות, Venice, 1618, p. 142a.

⁴⁶ Concerning this scholar, see the learned article by Cecil Roth in *J. Q. R.*, New Series, XV, 427-466.

⁴⁷ Printed in his commentary upon the *Mishneh Torah*, Venice, 1742, Vol. I, p. 75a-b.

⁴⁸ כרך של רומי, Leghorn, 1876, p. 4b, 4d.

the Geonic view cited above that a cantor may not sing in a foreign language, but that any tune is permissible in Hebrew. If it is allowed to use Arabic melodies which are mostly voluptuous, so he argues, how much more would it be proper to make use of Christian tunes which awaken a contrite spirit in man and lead him to the love of God.

Furthermore, he believed that no original Jewish melody has been preserved, except the one that is used for Psalm 144, which is proven by the fact that Jews everywhere sing it to the same tune.⁴⁹ Otherwise the melodies used by the Jews in the various countries are largely influenced by the music of the immediate environment.

Coming back to the question as to the attitude of the later rabbis concerning listening to music in general, we find that they were mostly guided by the view of Maimonides as given in the *Mishneh Torah* and repeated in the Tur and *Shulhan Aruk*.⁵⁰ Jacob Hagiz, a Palestinian scholar of the seventeenth century permitted Jews who were professional musicians to play in the homes of Gentiles on their holiday in order to promote good will.⁵¹

David b. Samuel ha-Levi, a Polish scholar, writes⁵² that the custom at convivial gatherings to sing the קריש, is contrary to Jewish law, for only hymns of praise are permitted at banquets. Similarly, he condemns in accordance with a Talmudic injunction, the practice of jesters who make humorous use of Biblical verses or phrases.

R. Joseph Hahn Nordlingen, rabbi of Frankfort, elaborates the above view as follows: the rule permitting one to sing hymns of

⁴⁹ Birnbaum, *Juedischer Kantor*, V, 1883, p. 348 has called attention to the fact that this observation is false, cf. also Francis Cohen in *Jewish Encyclopedia*, VII, 660.

⁵⁰ The ethical writers too, took a strong stand against music, cf. e. g. Bachya ben Asher, כד הקט, ed. Venice, 1546, p. 29a, Al-Nakawa, סגורת המאור (ed. Enelow), II, 349, Elijah di Vidas, ראשית חכמה, II:10, ed. Amsterdam, 1776, p. 88a. Isaiah Horowitz, שני לוחות הברית, ed. Amsterdam, 1653, p. 200a.

⁵¹ הלכות קטנות, no. 109.

⁵² Commentary to אורח חיים, 560. His view most likely goes back to the Maharil where it is stated that the singing of אורח, Ps. 118.21 at parties is not permitted (p. 185a) in accordance with Sanhedrin 101a.

praise at banquets refers to such as do not form part of the regular prayers, such as *אדון עולם*, *יגדל*, and *צור משלו*, but the recital of *קדיש*, *קדושה*, *קדושה*, with the name of God, would be absolutely prohibited because it would involve mentioning the name of God in vain, besides it would be making frivolous use of these prayers. The singing of Gentile songs, or love ballads would be altogether disallowed. Similarly, he considered it sinful for rich folks to hire teachers to instruct their daughters in music.⁵³

R. Judah Ashkenazi, a Polish scholar of the eighteenth century, holds that women who sing while working should be discouraged from doing so, but if they persist, then it is best not to admonish them at all.⁵⁴

To sum up briefly, in Tannaitic times, the Jews abstained from music as a token of mourning. During the Amoraic period the rabbis strove with might and main to dissuade the people from indulging in song, especially wine parties when women furnished the entertainment. The Geonim upheld the Talmudic law on this subject, and took steps to enforce it. They permitted music which was not of a sensuous character, at weddings. R. Isaac Alfasi summarized the view of R. Hai, and that became the norm for Maimonides and the subsequent codifiers. In spite of the rigor of the law, music could not be suppressed and not only did the Jews borrow melodies from the peoples among whom they lived for secular purposes, but they also imported various tunes for their divine services. The law prohibiting music was never fully observed, because it ran counter to human nature.

⁵³ יוסף אומץ, no. 889, 890, ed. Frankfort a. M., 1928, pp. 195–196. Cf. also Enoch b. Judah in *ראשית בכורים*, Frankfort, 1708, p. 29b, and Berliner, *Literaturblatt der Juedischen Presse*, 1876, no. 1, p. 3.

⁵⁴ Commentary, *Be'er Heteib* to *אורח חיים*, 560.

LAW AND ETHICS IN THE LIGHT OF THE JEWISH TRADITION*

In order to escape the moral hazard involved in this discourse on ethics,¹ we shall resort to the counsel of R. Akiba:² If you take on too much into your grasp you may not hold on to it, which in turn calls to mind, the aphorism of Domitius Afer, a famous orator in the time of Tiberius, "The prince who would know all, must needs ignore much."³

Now, ethics is more than a term, an idea, or even an association of ideas. It denotes a system of human relations, as well as a philosophy of human affairs. Yet it may not be illusory to allude briefly to the origin of the term ethics.

Ethics is derived from the Greek *ἠθός*⁴ just as its synonym

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¹ "Now, if Discourses on ethics," says Aristotle, "were sufficient in themselves to make men equitable, large fees and many (as Theognis says), 'could they win', quite rightly, and to provide such discourses would be all that is wanted." *Nicomachean Ethics*, X.9.3 (1179b, 4-7).

² Sifra to Lev. 15.25 (ed. Weiss, f. 79a), Y. Yoma II.5, (40a), R. H. 4a and parallels, cf. also Bacher, *Terminologie*, I, 111.

³ Quintilian, *Inst.*, VIII.5.3. Inasmuch as the subject matter of ethics *Inopem me copia fecit* (to use a phrase of Ovid, *Metamorphoses*, 3.466), I turn to Aristotle who advised that it is not necessary to examine every problem (*Topica*, I.11).

⁴ *ἠθός* is a lengthened form of *ἔθος*. As Aristotle has already noted these are cognate terms, linguistically and semantically related, *N. E.*, II.1.1, (1103a, 17). For *ἠθός* cf. Leist, *Gräco-italische Rechtsgeschichte*, p. 680. For *ἔθος* and *ἠθός* cf. Hellebrand in *Z. S. S. R. A.* 70 (1953), 256-258. The Hebrew *Weset* derived from *ἔθος* likewise denotes habit or custom, e. g. it is the custom (*Weset*) of a Gentile when he purchases a slave, to consult an astrologer, cf. Genesis Rabbah 87.4, pp. 1064-5, for other passages cf. Krauss, *Lehnwörter*, II.237.

morals is traced to the Latin *mores*,⁵ both denoting custom⁶ and usage, as well as habit, manners and disposition. In so far as law is derived from custom, law and morals have a common origin, but they diverge in development.⁷

In the Pentateuch⁸ and in the Talmud⁹ there is no distinct term for ethics, because as we shall note presently, the goal of ethics and law coalesce. However, the prophets, who were critical of the life and conduct of their contemporaries, distinguished diverse phases of ethical behavior by different terms, such as *Tov*, good conduct, *Mishpat*, justice, *Tsedakah*, righteousness, *Hesed*, lovingkindness, and *Emet*, truth.¹⁰ Did not Disraeli once remark that ethics is truth in action?

In the Middle Ages, under the spell of Greco-Arabic Philosophy¹¹ which stressed the moral perfection of human character and

⁵ For *Mos* (perhaps from the root *ma*, measure, or guiding rule of life) designates custom or manner, as not determined by laws but by man's will, cf. Harper's *Latin Dictionary*. Custom became the source of Law, cf. Schwind, *Römisches Recht*, 1950, pp. 23-24, and Schulz, *Roman Legal Science*, pp. 74, 137.

⁶ For the contrast between law (*νόμος*) and custom (*ἔθος*) among the Greeks, cf. Weiss, *Griechisches Privatrecht*, I (1923), 25-26, and R. Taubenschlag, "Customary Law and Custom in the Papyri," *Journal of Juristic Papyri*, I (1946), 41-54, and Hirzel, *Themis*, 1907, p. 373, note 6.

⁷ Pound, *Law and Morals*, 1926, p. 27.

⁸ Torah also was used to denote ethics, cf. Dodd, *The Bible and the Greeks*, pp. 42 ff. Like the term Torah the Greek *νόμος* has many meanings, cf. Pound, *Law and Morals*, p. 24, note 54. R. Taubenschlag, "Νόμος in the Papyri," *Journal of Juristic Papyri*, II (1948), 67-73.

⁹ For the term *Derek Erets*, which occurs in the Talmud, and signifies good manners, etiquette, worldly occupation, marital commerce, social intercourse as well as ethics, cf. Ben Yehudah *s. v. Derek Erets*, Krauss, *Talmudische Archäologie*, III, pp. 2 ff., and Higger, *Masektot Ze'ivot*, New York, 1929, and Kadushin, *Organic Thinking*, 1938, pp. 117 ff., cf. also the chapter on *Ethische Agada* in Zunz, *Die Gottesdienstliche Vorträge der Juden*, Frankfurt, 1892, pp. 103-125.

¹⁰ The poet Mimnerus (c. 630 B. C. E.) wrote that Truth is the most (righteous) of all things, (quoted by Forbes in *Juridical Review*, 64, 224). And another Greek writer tells us that Truth is the source of both prudence and wisdom, Dionysius of Halicarnassus, I.1.2.

¹¹ Cf. Yahuda, *Al-Hidaja*, 1912, pp. 53 ff. Cf. also Brüll, "Zur Geschichte der jüdisch-ethischen Literatur des Mittelalters" in *Jahrbuch für jüdische Geschichte und Literatur*, V-VI (1883), 71-93, 227-228, VII, 184.

intellect as the essence and goal of morals,¹³ the terms *Deot*¹³ (Disposition), *Musar*¹⁴ (Discipline), and *Middot*¹⁵ (Character) came into fashion to signify ethics. Saadia Gaon was the first Jewish author to compile a treatise on the science of Jewish ethics,¹⁶ (which constitutes the tenth chapter of his *Emunot we-Deot*). He centered his speculation on ethics as the best form of conduct (*Hanhagah*) in this world.¹⁷

¹³ Saadia was the first Medieval Jewish thinker, who considered the golden mean as the essence of morals and who utilized this doctrine for Jewish ethics, cf. Malter, *Saadia Gaon*, p. 257, n. 541a, cf. also Rosin, *Die Ethik des Maimonides*, p. 12, n. 1 and *passim*, Anatoli, *Mamad ha-Talmidim*, 98 ff., and Grünebaum, *ZDMG* 42, p. 285, the golden mean is foreshadowed in Eccl. 7.16–18, Y. Hag. II.1 (77a), Abot di R. Nathan, ch. 28, ed. Schechter, p. 86 and parallels noted there; cf. also Asin Palacios, *El Justo Medio en la Creencia . . . de Algazel*, Madrid, 1929.

¹⁴ This term was used by Maimonides for the second division of the first book of the Mishneh Torah which codifies eleven moral precepts of the Torah.

¹⁵ The Biblical term *Musar* is equivalent to the Greek *παιδεία* and the Latin *disciplina*. R. Hai Gaon composed an ethical poem under the title *Musar Haskel* and several books are printed under the title of *Sefer ha-Musar*. For מכה מדרות as disciplinary flagellation, cf. *Responsa* שער חסוד, no. 15.

¹⁶ *Middot* literally means measure, cf. above note 5. With this title there is the famous book of Ibn Gabirol, *Tikkun Middot ha-Nefesh*, as well as the *Sefer Ma'alot ha-Middot*. In Arabic the terms for ethics are *Adab* which is rendered by *Musar* and *Akhlak* which is the equivalent of *Middot*. In Islam, *Ilm Al-Akhlak* represents moral philosophy as well as the science of ethics, whereas *Adab* is good deportment which in a way corresponds to *l'honnêteté* of the French of the seventeenth century. *Adab* is less deep, but of wider compass than *Akhlak*. The literature of *Adab* contains manuals of good breeding, such as *Adab al-Dunya wal Din* by Abu' l Hasan Al-Mawardi, circa 1058 C. E., whereas the *Mizan al-Amal* of Gazali (which was translated into Hebrew) deals with *Akhlak*, cf. Carra de Vaux, *Dictionary of Islam*, I, 231–33, and D. M. Donaldson, *Studies in Muslim Ethics*, London, 1953. Maimonides explains that a *judex unus* is forbidden only ethically (*ala jihat Al-Adab*) but not legally (*ala jihat Al-Hirman*), *Commentary to Abot*, IV.8, ed. Baneth, Berlin, 1905, p. 35.

¹⁷ Cf. Malter, *Saadia Gaon*, p. 194, n. 456 and p. 248, n. 530. The fullest treatment of the Ethics of Saadia is the study of David Rau, *MGWJ*, vols. 55–56, 1911–1912. Cf. also Wise, *The Improvement of The Moral Qualities*, New York, 1902, p. 4, n. 1.

¹⁸ Cf. Malter, *loc. cit.*, pp. 247–260. The Arabic text reads: *Fima hua Al-Aslahu an Yasna-uhu An-Insanu fi' l Dunya* (ed. Landauer, p. 281). To

While the chapters of the Fathers (as well as the *Abot di R. Nathan*) abound in moral maxims, they are not an ethical treatise by design. But as the title, *Abot*, indicates, its original and prime purpose was to narrate the origin of the law, the chain of tradition with charming and characteristic sayings by the famous fathers of the oral tradition on justice, the study of the law, morals and related topics. In its plan, *Abot* does indeed remind one of the *Enchiridion* of Pomponius which is preserved in the *Digest*.¹⁸

It has often been noticed that in ancient society in general, and in Hebrew society in particular, religion, law and morals were undifferentiated,¹⁹ and Leviticus ch. 19 was cited as a classical example.²⁰ Nevertheless, it would be misleading to conclude from the merging of the diverse laws pertaining to sacrifices, *Orlah*, respect for parents, robbery, perjury, the poor laws, and the duty to love one's neighbor, that in the eyes of the inspired legislator these rules were of equal significance, or that the sanctions were the same, albeit they were of equal divine provenance.²¹ The lawgiver was laying down rules in advance for the purpose of establishing a sound economy and a good and great society. It is not the business of the legislator to engage in subtle analysis of the nature or relative value of the precepts that should prevail in his society.²² Noteworthy is the fact that

produce perfectly right action (*δικαιοπραγίαν*) Plutarch says, there must be three things, nature, reason and habit, (*φύσις καὶ λόγος καὶ ἔθος*), *De Liberis Educandis*, 4A, (ed. Loeb Classics, pp. 8–9), cf. also Seneca, *Moral Epistles*, 88.24.

¹⁸ Cf. my remarks in the *Proceedings of the American Academy for Jewish Research*, vol. XX (1951), 231–33.

¹⁹ Cf. Pound, *Law and Morals*, pp. 27–29. Pound noted three stages in the development of law, of which this was the first, the second was that of strict law and the third the infusion of moral ideas, cf. also Forbes, "The Greek View of Law," *Juridical Review*, 64 (1952), 214, and Truyol y Sera, *Historia de la Filosofia del Derecho*, Madrid, I (1954), 35–36, and J. Burnet, *Law and Nature in Greek Ethics*, London, 1929. Cf. also Philipponson, *The International Law and Custom of Ancient Greece and Rome*, I (1911), pp. 45 ff. and Diamond, *Primitive Law*, 1950, pp. 3–4.

²⁰ Moore, *Judaism*, II, 7, n. 3.

²¹ Moore, *loc. cit.*, II, 6.

²² Maimonides remarks that the object of the lawgiver is to establish the

in Lev. 19.37, the contents of this chapter are summed up as constituting the *Hukim* (Religion) and the *Mishpatim* (Law). The moral precepts were, of course, included in the *Mishpatim*. Significantly enough, Ezekiel,²³ in extolling the righteous man for obeying the laws, mentions also the moral precepts of feeding the famished and clothing the naked, and describes him as one who hath executed true justice (*Mishpat Emet*) between man and man. This is the earliest reference in Scripture to what the rabbis call the laws between man and his neighbor.²⁴

Strictly speaking, one cannot say that the Ancient Hebrews²⁵ or the Talmudic sages consciously formulated a theory of morals, yet from their random utterances, there emerges a fairly consistent and intelligible moral philosophy²⁶ pertaining to the nature of man and the grand ends of the law that are of permanent significance for mankind. Scripture and the Talmud exhibit a remarkable insight into the dual nature of man. No higher compliment was ever paid to the dignity of man²⁷ than in the statement that he was fashioned in the image of God,²⁸

good order of the state and its affairs (*Guide des Égarés*, II.311 of the French translation, f. 86b of the Arabic text). Philo, *De Opificio Mundi*, I.1, noted the differences between the preamble to the law of Moses and the proems of the other Greek Codes, for the latter, cf. especially, R. Düll, "προοίμια νόμων" in *Studi in memoria di Albertario*, Milan, I (1953), 317-333, and P. Janet, *Histoire de la science politique dans ses rapports avec la morale*, 3rd ed., I, p. 60.

²³ Ezek. 18.8.

²⁴ Yoma 8.9.

²⁵ Moral maxims in Proverbs call to mind similar moral reflections of the gnomic poetry of Greece of the 7th-6th centuries B. C. E. Speculation in early times was expressed in gnomic form, consequently the views of the first Jewish moral philosophers are deposited in the book of Proverbs. Lucian held that morals consisted of practical worldly wisdom tied to no system and attainable by every thinking man, cf. Friedländer, *Roman Life and Manners*, London, s. a., vol. III, p. 234. For Egyptian wisdom and the Book of Proverbs, cf. A. Robert, in *Mémorial Lagrange*, Paris, 1940, p. 164, n. 1, and J. J. A. van Dijk, *La Sagesse suméro-accadienne. Recherches sur les genres littéraires de textes sapientiaux*, 1953.

²⁶ For the term "Moral Philosophy," cf. Seneca, *Moral Epistles*, 89.9.

²⁷ Cf. R. D. Davenport, *Dignity of Man*, New York, 1955, H. Baker, *The Dignity of Man*, Cambridge, 1947, Lauterbach, *Rabbinic Essays*, Cincinnati, 1951, p. 277, R. Hayyim Halberstadt, *Dibre Hayyim*, I.35, and Saul Halevi, *Kelilat Shaul*, Vilna, 1879, ff. 34-35.

²⁸ Gen. 1.27, Abot III.14, and Maimonides, *Yesode ha-Torah* 4.8. Bar Kappara, explaining the symbolical meaning of overturning the beds in

and that he was made a little lower than the angels.²⁹ Moses, we are told, was as significant as the Cherubim.³⁰

mourning for a deceased kin, remarked "(God says) A precious image *εἰκόνην* of mine was in your house, you caused me to overturn it, therefore overturn your beds"; cf. Y. Berakot III.1 (6a) and Moed Katan III.5 (83a). R. Moses Sofer traces the custom of covering mirrors during mourning to this idea in the Palestinian Talmud, cf. his gloss to Y. Moed Katan III.6, ed. Vilna, f. 16b, cf. also Bier in *Handwörterbuch des Deutschen Aberglaubens*, vol. 9, pp. 547 ff. It is assumed here that death is the result of sin, cf. Shabbat 55a. Bar Kappara's statement is to be understood in the light of the parable in Exodus Rabbah 30.16. "A man who defaced (*Kipeah*) the statue (*εἰκόνην*) of a king was cited before the court (*βῆμα*). The king said: 'Did you read my ordinance (*διάταγμα*). Whoever touches my statue shall perish. Why did you not spare yourself?' Similarly if one slays it is as if he removed the statue of the king, and he thereby legally forfeits his life, for man is created in the image of the ministering angels." Note that in Y. Berakot cited above, the text speaks of man as being created in the image of God, whereas in Babli Moed Katan 16b it is said that he is created in the likeness of the image (*Demut*, *εἰκόνην*) of God, and in Ketubot 8a it is said that man is created in the image of the likeness of His form. This is a sort of circumventing the anthropomorphism. At the death of an unpopular emperor, his statue was overturned; cf. Mekilta to Ex. 20.16, ed. Lauterbach, II.262 and Exodus Rabbah 42.3 for the latter; cf. Ziegler, *Die Königsgleichnisse des Midrasch*, Breslau, 1903, pp. 21–27, and Friedländer, *Roman Life and Manners*, London s. a., II, 279–280. According to the Digest, one who melts down statues of the Emperor, which have been consecrated, defaces such statues or images, or commits any other act of this kind, is liable under the Julian law relating to *lésé-majesté*; cf. D. 48.4.6, and 48.4.7.4. For man as the image of God in Jewish Hellenistic literature, cf. *Theologisches Wörterbuch zum neuen Testament*, Stuttgart 1935, vol. I, 378–395. Heinemann, *Philons griechische und jüdische Bildung*, Breslau, 1932, 197–198, Stein, *Philo of Alexandria*, Warsaw, 1937, (Hebrew) p. 16, and p. 220, note 1, Wolfson, *Philo I*, (1947), pp. 238–239 and Baer, *Yisrael ba-Amim*, Jerusalem, 1955, pp. 86 ff. and J. Gilet, "L'homme image de Dieu dans les commentaries littéraires de Philon d'Alexandrie" in *Studia Hellenistica*, V, 1948. For the concept of man as the image of God in Classical writings, cf. Cicero, *De Natura Deorum*, I.90, and Seneca, *Moral Epistles*, 31.11. Lysias remarks that if one wounds a man's person, he shall be banished, how much more should one who injures the images of the gods (*τὰ ἀγάλματα τῶν θεῶν*) be barred from approaching the temples, cf. *Against Andocides*, 15, note also F. Michaeli, *Dieu à l'image de l'homme étude sur la notion anthropomorphique de Dieu dans l'ancien Testament*, 1950. Cf. also Plutarch, *Moralia*, 780 E–F.

²⁹ Ps. 8.6–10. In Exodus Rabbah, 32.1 Adam is compared to the angels, cf. also Maimonides, *Yesode ha-Torah*, III.9.

³⁰ Jacob d'Illescas, (an Italian scholar of the 14th century), *Imre No'am*,

And yet on the other hand, it was noted that the imagination of the heart of man was evil continually from his youth.³¹ Experience taught the rabbis the maxim: "Pray for the welfare of your government, were it not for the fear of the rulers, every man would devour his fellow alive."³² As large fish devour small fish, so would man do, were he not restrained by the government.^{32a} Man can curb and conquer the evil tendencies in him only by submitting to the discipline of the law.³³ I have created the evil tendency in man, but I have brought into being the Torah which will serve as an antidote.³⁴ In other words, man's unruly nature can be domesticated by the Torah.

But what is the nature of this law: It is primarily a system of divine commands (*Mitsvah*) consisting, as we have just

Cremona, 1566, f. 36a. "Let us therefore," says Pico di Mirandola, "by emulating the cherubic way of life on earth, by taming the impulses of our passion with moral science, by dispelling the darkness of reason by dialectic . . . cleanse our soul." Cf. his *Oratio de Hominis Dignitate*, Latin text with an English translation by Elizabeth Forbes, Lexington, 1953, p. 9.

³¹ Gen. 6.5, and 8.21.

³² Abot III.2. For man delighteth to ruin man, says Seneca, *Moral Epistles*, 103.3.

For laws are what bind cities together . . . So the cities are destroyed
When the laws are abolished
Hence, the theologian Orpheus hints at their necessity when he says:
There was a time when every man lived by devouring his fellow
Cannibal-wise, and the stronger man did feast
For when no law was in control each man maintained his right by
Force of hand, even as it is permitted to
Fishes and beasts of the world and the winged ravens and vultures
Each to devour the other, for justice exist not among them
Until God in his pity for their misery sent to them law-bearing goddesses;

cf. Sextus Empiricus, *Adversus Mathematicos*, II.31-32.

^{32a} Cf. Abodah Zarah 4a, and Rashi, *Betsah* 23b, *s. v. We-ain*.

³³ Cf. Abodah Zarah 5b, where it is stated that the righteous are in control of their passions. The righteous sublimate the evil passion into generous impulses as Abraham did, cf. P. Berakot IX.7 (14b). Occasionally the Torah made concessions to the human passions as in the case of the rule pertaining to the Gentile captive (Kiddushin 21b). The Torah preferred conduct which requires self-discipline, cf. Baba Metsia 32b.

³⁴ Kiddushin 30b, cf. in Baba Batra 16a the argument against free will.

noticed, of ceremonialism, jurisprudence³⁵ and ethics.³⁶ Its ends are the preservation of order,³⁷ peace, (*Shalom*) liberty, (*Heruth*) and the general welfare (*Tikkun ha-Olam*). Sometimes these are incompatible goals, as when peace must sometimes be sacrificed to insure order.³⁸ The ways and means to attain these grand ends are nothing less than justice, which means that there must be just laws.

The true criterion of a great nation is one that is governed by just laws. Israel was described in Scripture as a great nation although it is few in numbers.³⁹ For a big nation is not necessarily a great nation any more than a bulky history such as the lost *Annals* of *Tanuscus* was a great history.⁴⁰ The true test of a great and civilized nation is, in very deed, one which is governed by just laws that are administered with wisdom. This, in fact, is the implication of the exhortation of Moses to Israel.⁴¹ "Observe and obey them, for this is your wisdom and your understanding in the sight of the people, when the peoples will hear of those statutes, they shall say: Surely this nation is a wise and

³⁵ Jacques Ellul is wrong when he says: "La Bible ne connaît pas la notion de Droit au sens où nous l'entendons aujourd'hui." Cf. *Le Fondement théologique du Droit*, Paris, 1946, p. 26.

³⁶ Deut. 6.1 and 6.20. For the latter verse, cf. the excellent observations of Abravanel in his *Zebah Pesah*, ed. Eisenstein, pp. 80–81.

³⁷ Cf. *Seder Yisrael*, i. e., Jewish law in *Responsa of Elijah ibn Hayyim*, II.53. In Isa. 54.14, "in righteousness thou shalt be established," means you shall have order based on justice. In the Greek view, order is the essence of νόμος, cf. Thonissen, *Le Droit Pénal de la République Athénienne*, Paris, 1875, pp. 12–13, 16–17 and Forbes, *Juridical Review*, 64 (1952), p. 218. In Arabic, *Nizam* means not only order but also law and custom.

³⁸ Cf. Pound, *An Introduction to the Philosophy of Law*, New Haven, 1922, p. 35. Law is a form of order and good law must necessarily mean good order, cf. Aristotle, *Politics*, VII.4.5 (1326a, 30–31). For νόμον καὶ πέρας ἔχοντα, cf. Plato, *Philebus*, 26b and Grenet, *L'Analogie Philosophique dans Platon*, Paris, 1948, p. 139, note 493.

³⁹ Deut. 7.7.

⁴⁰ Cf. Seneca, *Moral Epistles*, 93.11.

⁴¹ Deut. 4.6, 8. "For I suppose that no man living will attribute the prosperity of Athens, her liberty, her popular government, to anything rather than to the Laws," cf. Demosthenes, *Against Timocrates*, 5. Cf. also Hirzel, *Themis*, p. 292, note 3.

understanding people. What great nation is there that has statutes and ordinances so righteous as all this law (Torah) which I set before you this day." Mark well, that not only the jurisprudence (*Mishpatim*) but also the ceremonials (*Hukkim*) are described as righteous⁴² that is to say, even the ritual rules must be subject to the moral law.⁴³ For the ceremonials express symbolically in a visible manner man's relation to the Invisible, and although the forms of ritual do not effect the essence of morals, yet the performance of a religious rite may not entail an infraction of what is right.⁴⁴

However, just laws in themselves do not insure a just society. For human beings are frequently all too human, brutish⁴⁵ and ruled by animal spirits.⁴⁶ As it is normal for wolves to kill goats,⁴⁷ so it is natural for the strong to trample upon the weak and to deprive their fellow men of life, liberty, and property without due process of law, if they can do so with impunity or with the connivance of the powers that be. The prophets fulminated against the people who abused the law and good morals by the miscarriage of justice, and found no inconsistency in flouting the moral law and making peace with the Deity⁴⁸ by visiting His temple, offering sacrifices to Him, and observing the

⁴² For an attempt to explain the ritual laws (*Hukkim Tsaddikim*) as just, cf. Sifra, ed. Weiss, f. 86a, Leviticus Rabbah 22.7 and Maimonides, *Guide des Égarés*, II.40.

⁴³ Hence a priest who committed homicide may not recite the priestly benediction, Berakot 32b, but cf. Y. Gittin V.9. Cf. also Tosafot Yebamot 7b, s. v. שְׁנֵי מַסְרֵי.

⁴⁴ Thus one may not perform the religious ceremony with a stolen *Lulab*, this is termed a sinful religious act, cf. Sukkah 30a, and Y. Hallah I, end.

⁴⁵ Ps. 92.7.

⁴⁶ Eccl. 3.20.

⁴⁷ Baba Batra 16b. This is regarded by the rabbis as part of natural law, *Minhago shel Olam*, for the latter, cf. also Maimonides, *Yesode ha-Torah* X.1, and Rashi to Baba Batra 78b s. v. *Mili*, who uses the phrase in the sense of custom or habit, cf. also Strauss, *Natural Right and History*, Chicago, 1953, p. 83. To fishes and beasts and winged birds Zeus gave this law, that they should devour one another, since there is no justice in them but to man he gave justice which is far the best. Cf. Hesiod, *Works and Days*, V.276-278, and Xenophon, *Memorabilia*, II.9.2.

⁴⁸ No one can be termed truly pious (*Tsaddik Tov*) who is not good towards his fellow men, Kiddushin 40a.

ceremonials with precision and punctillio. Jeremiah poured out phials of acid upon those who broke the moral principles of the Decalogue and fled to the Temple for refuge.⁴⁹

While the Greek philosophers were probing into the nature of virtue, the Hebrew prophets were decrying the vice of moral evil precipitated by the natural inequality of man caused by his differences in intellectual, physical, and material endowment, which became the source of unruly power.⁵⁰ They were infuriated by the greed and the selfishness of the wise, the mighty and the rich who took advantage of the simple, the frail, and the pauper. "Let not the wise man glory in his wisdom, neither let the mighty man glory in his might, let not the rich man glory in his riches; but let him that glorieth glory in this, that he understandeth and knoweth Me, that I am the Lord who exercise mercy, justice and righteousness, in the earth; for in these things I delight, saith the Lord."⁵¹

A Babylonian scholar asserted his belief that man's attributes and acquisitions are to some extent predetermined, but not his moral purpose, or as he put it, man is predestined to be healthy or feeble, wise or foolish, wealthy or poor, but he is free to be moral or wicked.⁵²

A great French critic who penetrated deeply into the mind of the Hebrew prophets summed up their attitude in these scintillating words.⁵³ "Greece had only one thing lacking in the circle of her moral and intellectual activity, but this was an important void Her philosophers, while dreaming of the immortality

⁴⁹ Jer. 7.9-10.

⁵⁰ Cf. B. Russell, *Power, A New Social Analysis*, New York, 1938.

⁵¹ Jer. 9.22-23.

⁵² Niddah 16b, but cf. Baba Batra 16a. For strength, wisdom and health as sources of power, cf. also Mekilta, ed. Horowitz, p. 226 and Nedarim 38a, for the morality of wealth, cf. A. Rondelet, *La Morale de la Richesse*, Paris, 1864, and Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, New York, 1930. For the Hebrew term for "calling" *Melakah*, see Weber, *loc. cit.*, p. 204. Cf. also Ringgren, *Studies in Arabian Fatalism*, Uppsala, 1955, p. 119.

⁵³ Renan, *History of the People of Israel*, Boston, I (1894), pp. VII-VIII. Cf. A. Moret, *L'Immortalité de l'âme et la Sanction morale dans l'Égypte Ancienne*, in Musée Guimet, Annales: Bibliothèque de Vulgarisation, Tome XXIX, Paris, 1908, pp. 49-88.

of the soul,⁵⁴ were tolerant towards the iniquities of this world . . . Israel never stood quietly by to see the world so badly governed under the authority of a God reputed to be just. Her sages burnt with anger over the abuses of the world. A bad man dying old,⁵⁵ rich and at ease, kindled their fury, and the prophets of the ninth century B. C. elevated this idea to the height of a dogma. The Israelitish prophets were impetuous writers such as we of the present day should denounce as socialists and anarchists. They were fanatics in the cause of social justice and loudly proclaimed that if the world were not just, or capable of becoming so, it had better be destroyed, a view which, if utterly wrong, was very fertile in results, for, like all the doctrines of despair, it led to deeds of heroism and brought about a grand awakening of the forces of humanity."

The prophets looked upon law, in the larger sense, as ethical jurisprudence. In its narrower sense it was a part of the larger field of morals.⁵⁶ In any event, they repudiated any antinomy between law and ethics,⁵⁷ since they regarded the end of law as a realization of moral goals such as righteousness, lovingkindness and truth. The law, they held, could not long retain its dignity and usefulness if it runs contrary to justice.⁵⁸ Ethics is the spirit

⁵⁴ The poet Ennius wrote as an inscription for his bust the following:

Pay me no tears, nor for my passing, grieve,
I linger on the lips of men and live,

In the original it reads as follows:

*Nemo me lacrumis decoret, nec funera fletu,
Faxit. Cur? Volito vivus per ora virum.*

Quoted by Cicero, *Tusculan Disputations*, I.15.34. This same thought is conveyed metaphorically by R. Simon ben Yoḥai, who said: "The lips of a scholar do move in the grave, when his teachings are recited in this world," Yebamot 97a.

⁵⁵ The natural death of the wicked is no atonement for their sins, cf. Sanhedrin 47a.

⁵⁶ Jellinek, *Die sozioethische Bedeutung von Recht, Unrecht und Strafe*, 2nd ed., 1908, chs. 1-2; Courcelle-Seneuil, *Préparation à l'étude du droit*, 1887, Book 3, p. 203, adopts Jellinek's theory of law as a minimum of ethics, cf. also Demogue, *Les notions fondamentales de droit privé*, 1911, pp. 13 ff.

⁵⁷ Del Vecchio, *The Formal Bases of Law*, 1914, 108, cf. also Pollock, *Oxford Lectures*, 1890, pp. 13-17.

⁵⁸ Djuvara, *Le fondement du phénomène juridique*, 1913, p. 194.

which informs the letter of the law. This view later became the philosophy of the Stoics, who declared that law should accord with morals. It received its legal expression in the Digest in Ulpian's formulation:⁵⁹ "The precepts of the law are the following: to live honorably, to injure no one and to give everyone his due." Yet a study of the social and political history of society reveals a constant conflict between law and morals. Let us see how it arises and why it persists.

Human activity consists of thoughts,⁶⁰ words⁶¹ and deeds.⁶² Law and morals both impinge upon human activity with different force and range. But law is set off from ethics in objective and scope. The objective of law as we have noted before, is the preservation of order in society, which it accomplishes by regulating the actions of man, by imposing definite punishment for the infringement of its rules. Since the law operates with sanctions, it necessarily deals only with overt acts.⁶³ The rabbis laid down the general rule that violations which do not involve any overt act, are not liable to flagellation.⁶⁴

Ethics on the other hand, developed into a concern for the perfection of human character.⁶⁵ Hence men's feelings,⁶⁶

⁵⁹ *Digest*, I.1.10.7, cf. Cujas, *Opera Omnia*, Venice, III (1758), 707C, Cairns, *Legal Philosophy from Plato to Hegel*, p. 97, note 46. Von Lübtow, "De justitia et iure" in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, 66 (1948), 458-565, and J. Löwy, *Bikoret ha-Talmud*, Vienna, I (1863), 98.

⁶⁰ Philo, *Vita Mosis* II.212, Man is not ordinarily punished for his thoughts, cf. Kiddushin 39b.

⁶¹ When thoughts are expressed in words they may induce an obligation and penalty, cf. Tosafot, Baba Metsia 43b s. v. *ha-Hoshev* and the gloss of Strashun, *ad loc.*

⁶² Cf. Tosafot, Hullin 12b, s. v. *We-tebai*.

⁶³ The German Pandektists of the nineteenth century analyzed some fifteen elements that may enter into a juridical act, cf. Czychlarz, *Institutionen des römischen Rechts*, 1924, pp. 40-59.

⁶⁴ Shebuot 4a.

⁶⁵ This is implied in the reduction of the rules of the Torah to eleven moral principles presupposed in Psalm 15, cf. Makkot 24a. Cf. also Guttmann, "Die ethische Schrift Sefer hajaschar und ihre philosophischen Anschauungen," in *M. G. W. J.* 63 (1919), 291-314.

⁶⁶ The rabbis made incursions into the realm of man's deepest feelings.

thoughts,⁶⁷ and motivations⁶⁸ are subject to its scrutiny. While morals are internal, law is external. Thus, one who steals because of hunger is treated with pity rather than with contempt, but he is punished for the protection of society. "Men do not despise a thief, if he steals to satisfy his soul when he is hungry. But if he be found, he shall restore sevenfold. He shall give all his substance of his house."⁶⁹ The punishment of what is morally reprehensible, is left to remorse, to conscience or to the social disapproval of society. Persons with a flexible conscience, who think whatever they do is right, vainly believe that they can escape even these sanctions. "All the ways of man are clean in his own eyes, but the Lord weigheth the heart," says the author of Proverbs⁷⁰ in his rejection of ethical relativity.⁷¹

Thus they prescribed that one should not weep more than three days over the loss of a near relative, cf. Moed Katan 27b. Similarly we read in Seneca: "Do you think that the law which I laid down for you is harsh, when the greatest of Greek poets has extended the privilege of weeping to one day," *Moral Epistles*, 63.2, cf. also Loeb Classics ed., p. 430, note a, and Ben Sira, 38.17.

⁶⁷ Sinful thoughts are unethical (Berakot 12b and Niddah 13b) and are sometimes physically harmful (Yoma 29a). They are atoned for by a burnt offering, cf. Y. Shebuot I.9 (33b) and parallels noted by Margulies in his edition of Leviticus Rabbah, p. 153.

⁶⁸ One who intended to eat swine, and ate lamb, requires pardon, Sifre Num. 153, ed. Horowitz, p. 202. Similarly, there is the notion, that a sin committed from good motives is more meritorious than a legal act performed with indifferent motivation; cf. Horayot 10b; for Job's act of charity cf. Baba Batra 16a. The question was raised in the Palestinian Talmud whether a court of law may use strategy to force a levir to act equitably towards his sister-in-law, cf. Y. Yebamot IV.12 (6b) and Babli Yebamot 106a. According to the sages one who commits unintentional blasphemy is exempt from bringing a sacrifice, since he committed no act (M. Keritot I.2). Raba explained that even according to R. Johanan who held that talking is considered an act since it involves the movement of the lips (עקיפת שפתיו הוי מעשה) still with regard to blasphemy, inasmuch as the real sin consists in the evil intent to blaspheme (הואיל וישנו בלב), the unintended utterance is no act requiring atonement (Keritot 3b-4a).

⁶⁹ Prov. 6.30, Rashi *ad loc.* and Tosefta Baba Kamma VII.13.

⁷⁰ Prov. 21.2, cf. also 16.2. Cf. also Tosefta Yebamot I.11, and David Pardo, *ad loc.*

⁷¹ Cf. Westermarck, *Ethical Relativity*, New York, 1932, and E. Kahler,

Nevertheless, the law takes into consideration the thoughts and intentions insofar as they determine the nature of the act. A distinction is drawn between accident and design in homicide,⁷² and on the other hand, while acts with malice are morally more reprehensible than those caused by stupidity, yet negligence is as punishable as wilful damage. Hence the Mishnaic ruling, a man is always considered as forewarned and is responsible for the damages he caused.⁷³

The domain of law and morals is neither identical nor wholly distinct. They overlap, and form a concentric circle. For there is a realm of law that is neutral or morally indifferent, as Aristotle has already noticed. "A rule is conventional that in the first instance may be settled in one way or the other indifferently, though having once been settled it is not indifferent: for example, that the ransom for a prisoner shall be a mina, that a sacrifice shall consist of a goat and not of two sheep; and any regulations enacted for particular cases, for instance the sacrifice in honour of Brasidas."⁷⁴

For example in Jewish law while the particular formalities in a contract of sale and purchase involved no ethical considerations, yet the failure to keep one's word in an oral contract, is morally condemned.⁷⁵ In harmony with the rabbis, is Ulpian's statement:

Man the Measure, New York, 1943. Cf. also Schmidt's remarks: From an ethical standpoint Ibn Gabirol insisting upon the autonomy of morality, is not less important than Ibn Ezra and Maimonides, cf. *Aspects of Ethical Religion*, ed. Bridges, New York, 1926, p. 246.

⁷² Ex. 21.12-14, cf. also Demosthenes, *De Corona*, 274. L. Gernet, *La Pensée Juridique et Morale en Grèce*, Paris, 1917, pp. 350-384, and Hegel, *Philosophy of History*, New York, 1900, p. 129.

⁷³ M. Baba Kamma II.6.

⁷⁴ *N. E.*, V.7.1, (1134b, 20-34). Incidentally, it may be noted that Joseph ben Shemtob (Spanish scholar, d. 1480) was one of the first scholars to institute a comparison in a serious manner between the ethics of Judaism and those of Aristotle. To illustrate his points, he translated extracts from the Latin version of Aristotle's ethics, cf. his *Kebod Elohim*, Ferrara, 1556. Other extracts from Aristotle's ethics may be found in his homiletical work entitled *En ha-Kore*, which is extant only in manuscript. For Hebrew versions of Aristotle's *Ethics*, cf. Steinschneider, *Hebräische Übersetzungen*, Berlin, 1893, pp. 209-215.

⁷⁵ Baba Metsia IV.2, and Boaz Cohen, "Traditio Clavium in Jewish and

"What is so suitable to the good faith of mankind as to observe those things which parties have agreed upon?"⁷⁶ The technicalities prescribed for divorce proceedings do not ordinarily involve moral principles, yet the legal grounds for divorce are governed by ethical presuppositions. A man may donate a Meal-offering consisting of no more than sixty tenths of an Ephah, if it is offered in a single vessel. It is so in all measures prescribed by the sages. A man may immerse himself in forty Seahs of water, but not in forty Seahs minus one Kortob.⁷⁷ In any event, there is a moral obligation⁷⁸ attached to the obedience of every law and ritual practice as such, in so far as it involves the fulfillment of a divine command, or contributes to the welfare of society (*Tikkun ha-Olam*).

Since law must deal with actions, the tenth commandment, thou shalt not covet thy neighbor's possession, is relegated to the realm of pure morals,⁷⁹ unless it takes on the concrete form of larceny. One is reminded of a school teacher who said: "Boys, be pure in heart, or I'll flog you."⁸⁰

Similarly, the law does not punish wilful and morally inexcusable inactions, as when a person fails to save his fellow from drowning. To be sure he has violated the moral injunction "Thou shalt not stand idly by the blood of thy neighbor."⁸¹ Neither is it feasible to convert the moral duty of gratitude into

Roman Law," in *Studi in memoria di Paolo Koschaker*, vol. II, Milan, 1954, p. 592, note 4.

⁷⁶ *Digest*, II.14.1, pr.

⁷⁷ M. Menahot XII.4. A Kortob is a tiny liquid measure equal to one sixty-fourth of a Log, cf. Tosefta, Baba Batra, V.10, and Tosafot Yom Tob, to Mikwaot III.1.

⁷⁸ Moral obligation is sometimes designated in Hebrew by the term *Mitsvah*, cf. Ketubot 49a.

⁷⁹ The breaking of the tenth commandment leads to the trespassing of all the commandments, cf. Pesikta Rabbati 16, f. 107a-b, Ginzberg, *Legends*, VI, 43, note 235, Philo, *De Decalogo*, 28.142-153, Seneca, *Moral Epistles* 8.9. Cf. also Baba Metsia 5b, Maimonides, *Gezelah* I.9-12, *Hoshen Mishpat* 359.10-11, Seemann, *Minhat Solet*, I, New York, 1950, pp. 300-306.

⁸⁰ Amos, *Science of Law*, pp. 33-34.

⁸¹ Cf. Lev. 19.16, and Sifra, *ad loc.*, ed. Weiss, f. 89a, and Boaz Cohen, "The Principle of Causation in the Jewish and the Roman Law of Damages," in *Studi in Onore di Pietro de Francisci*, vol. I, Milan, 1954, p. 331, n. 2.

a legal obligation. The rabbis make it plain⁸² that a man ought to show gratitude to the locality in which he has enjoyed some benefit. But such a rule, generally speaking, can not be implemented into a law,⁸³ as was noticed by Aristotle, who wrote: "This is why we set up a shrine of the graces in a public place to remind men to return kindness."⁸⁴ However, moral principles in course of time are often translated into rules of equity, which in turn are converted into legal obligations.⁸⁵

It is a fact that law usually lingers behind ethics in most societies no matter how advanced they are. The situation becomes serious when the discrepancy between law and morals is acute, for law is not self-enforcing, and consequently disregard of the law becomes much in evidence. Neither can law afford the luxury of logic at the expense of human living which is not explainable solely in terms of logic.^{85a} When legal wits and bigwigs set store

⁸² Genesis Rabbah 79.6. Ingratitude can only be morally condemned. It is a failing of man beginning with Adam, (cf. Aggadat Bereshit, ed. Buber, p. 125, and Leviticus Rabbah IV.2) and extends even to nations, cf. Abodah Zarah 5a.

⁸³ For the punishment of ingratitude, cf. Seneca, *Moral Essays, On Benefits*, III.6.2, who writes: "With the exception of the people of Macedonia in no state has the ungrateful man become liable to prosecution" however, according to Valerius Maximus II.6.6 ingratitude had its penalty at Athens also. For ingratitude in Greek law, cf. also Gide, s. v. *Acharistias Diké* and Glotz, s. v. *Kakoseos graphé* in *Dictionnaire des antiquités grecques et romaines*, I, 25, and III, 792-797. For the gratitude of animals, cf. Philo, *De Decalogo*, 23.113-117. For the punishment of ingratitude of a freed slave in Roman Law, cf. *Digest* 4.2.21 pr. For ingratitude as a legal ground for disinheritance, cf. *Novels of Justinian*, 115.3.

⁸⁴ *N. E.*, V.5.7 (1133a 7).

⁸⁵ The rabbis converted the moral principle of giving charity into a legal obligation, cf. Baba Batra 8b. According to an older tradition, the father during his lifetime had no legal obligation (*Hobah*) to maintain his daughter, but he was under a moral obligation (*Mitsvah*) to do so, Ketubot 49a. Another instance is the rule that the host may be coerced to escort his guest on parting (Sotah 46b, Maimonides, *Hilkot Ebel* 14.3), cf. also *Eben ha-Ezer*, 79.3.

^{85a} Note John Morley's interesting observation: "We may apply to humanity the idea which, as Hebrew students tell us, is imputed in the Talmud to the Supreme Being. God prays, the Talmud says; and his prayer is this, — 'Be it my will that my mercy overpower my justice.' And so with men, with or without their will, their mercifulness overpowers their logic. And not their

by matters of syllogisms and make presumptions that have little basis in the realities of human thinking and behavior, then legal pedantry fathers puerilities that propel smiles from the innocents abroad. This point has been well scored by Marlowe in his *Dr. Faustus*.

Settle my studies, Faustus, and begin
To sound the depth of that thou wilt profess
Having commenced, be a divine in show,
Yet level and at the end of every act,
And live and die in Aristotle's works.
Sweet analytics, 't is thou hast ravished me.
*Bene disserere est finis logices.*⁸⁶
Is to dispute well logic's chiefest end?
Affords this art no greater miracle?

.

Where is Justinian?
*Si una eademque res legatur duobus alter rem,
alter valorem rei*⁸⁷
A petty case of paltry legacies.
*Exhaereditare filium non potest pater nisi.*⁸⁸
Such is the subject of the Institute
And universal Body of the Law
His study fits a mercenary drudge,
Who aims at nothing but external trash;
Too servile and illiberal for me
When all is done, divinity is best;
Jerome's Bible,⁸⁹ Faustus view it well.

mercifulness only, but all their good impulses overpower their logic." *On Compromise*, London, 1898, p. 72.

⁸⁶ "To argue well is the end of logic." Cf. Cicero, *De Oratore*, II.38.157. As Seneca observed: For over-analysis is faulty in precisely the way as no analysis at all, whatever you cut so fine that it becomes dust is as good as blended into a mass again, *Moral Epistles*, 89.3.

⁸⁷ If one and the same thing is bequeathed to two persons, one gets the thing, and the other the value of the thing, cf. *Institutes*, II.20.8. Cf. Y. Makkot, I.7.

⁸⁸ A father cannot disinherit his son except, cf. *Institutes*, II.13.1.

⁸⁹ As early as the time of Jerome the Jews read and criticized his translation,

However a certain lag is inevitable in the nature of things. Since law must, first of all, insist upon an orderly and just procedure, it is uniform, regular and predictable, whereas human beings vary in nature, temperament and circumstances.⁹⁰ Legal

cf. Blondheim, *Les Parlers Judeo-Romans et la Vetus Latina*, Paris, 1925, p. XXXV. In 1529 we find Steuchus Eugubinus complaining that the Jews looked down upon the Vulgate as a corrupt translation, cf. *Urtext and Übersetzungen der Bibel*, Leipzig, 1897, p. 110. Jerome was frequently cited by medieval Jewish scholars such as David Kimḥi, Abu al-Walid, Abraham ibn Ezra, Samuel ben Meir, Naḥmanides, Joseph Albo, and the Karaite Isaac Troki, cf. *J. E.* VII.116. R. Jeroḥam ben Meshullam (a fourteenth century Provençal scholar) cited the view on the authority of the Tosafot that it is prohibited to sell to gentiles "books unfit to read" (*Sefarim Pesulim*) as it would be putting a stumbling block before the blind (cf. Urbach, *Ba'ale ha-Tosafot*, Jerusalem, 1955, pp. 291, 392). After some hesitation, R. Jeroḥam concluded that this includes not only copies of the New Testament, which contains erroneous doctrines but also copies of the Hebrew Scriptures translated into the Roman that is the Latin language. For the translator deliberately departed from the literal text in order to read Christian doctrines into it, as they did, when they rendered the verse in Ps. 22.17 as if it were written "*Karu yaday we-Raglai*" i. e., they dug my hands and my feet, (cf. the Vulgate, *Foderunt manus meas et pedes meos*). In the phrase, and lo, three men (Gen. 18.2) the translator rendered the Hebrew *Anashim*, i. e. men, as if the text read "*Ishim*" in order to read the doctrine of the Trinity into it. He reasoned, that since *Ish* may denote any existing thing, even an incorporeal being, then this verse would accordingly contain an allusion to the Holy Ghost, which would not be so, if the text read *Anashim*. For *Enosh* in Hebrew refers only to corporeal beings, but a literal rendering of *Anashim* would be inconsistent with the Christian doctrine of the Trinity, which is composed of incorporeal persons, cf. *Toledot Adam we-Havah*, 17.5, ed. Venice, 1553, f. 158 c-d. The Christian reference to the Trinity in Gen. 18.2 (cf. Williams, *Adversus Judaeos*, p. 179) was combatted by Saadia, (*Emunot we-Deot* II.6, Arabic text ed. Landauer, p. 90, cf. also Loeb, *R. E. J.*, 18 (1889), 48-49), Joseph Kimḥi (*Milhemet Hobah*, Constantinople, 1710, pp. 31a-32a) and Abraham Ibn Ezra to Gen. 18.2. The term *Ishim* which occurs thrice in the Bible, Isa. 53.3, Ps. 141.4 and Prov. 8.4 is translated by *vir* or *homo*. While in the Vulgate it is the Hebrew *Panim* which is usually translated as *Persona*, it seems that in the text of the Vulgate which R. Jeroḥam had seen, the phrase *Sheloshah Anashim* was translated as *tres personae*, just as the Hebrew phrase *Ruah Apenu Meshiah Adonai* was translated by Tertullian as *Spiritus personae eius Christus dominus* (*Adv. Praxean*, c. 14), cf. Schlossman, *Persona und πρόσωπον im Recht und im Christlichen Dogma*, Kiel, 1906, p. 102, n. 1.

⁹⁰ Cf. *Guide des Égarés*, II.40, *Hilkot Deot* I.1. Pico di Mirandola writes:

principles are precise, and nothing is left to doubt with respect to the legality of a particular form of conduct.⁹¹ If legal doubts exist at the time of action, it is evidence of the imperfection of the rule.

Moral rules are relative to the situation, and every man in a crisis of action must determine his conduct, guided by conscience, a sense of justice, experience, and wisdom. The rabbis say: "Why does Scripture juxtapose moral conduct and wisdom?"⁹² To teach us that if a man is possessed of wisdom (*Hokmah*) he can better practice moral conduct (*Musar*).⁹³ Not every moral judgment can claim subjective certainty or objective validity. Hence the Talmud presents a difference of opinion with respect to the case of two wayfarers in a desert, only one of whom had enough water for himself. If he should share it with his comrade, both of them would perish. If he drank it himself he alone would be saved.⁹⁴ One is reminded of an analogous problem in Hecaton's *Moral*

"For this reason the Persian Euanthes, in describing the Chaldaean theology, writes that man has no semblance that is inborn . . . whence this saying of the Chaldaeans: *Hanorish tharah sharinas*, that is, "Man is a being of varied, manifold, and inconstant nature." *Oratio De Hominis Dignitate*, Lexington, 1953, p. 6.

⁹¹ Suspension of judgment is a highly refined act. In the Talmud there are a number of unresolved questions of law indicated by the term *Teku*, literally, it shall stand (unresolved). Elijah Levita in his *Tishbi*, Isny, 1580, s. v. *Tik*, derives the word from *θήκη*, literally sheath. In a copy of the Isny edition belonging to Mr. M. Lutzki there is a manuscript note in a seventeenth century hand which explains the meaning as follows: "Perhaps the meaning is to put it in the sheath, i. e., to other papers which can not be dealt with, in Latin it is denoted by the phrase *ad acta*." For the method of resolving the *Tekus*, cf. Malachi Cohen, *Yad Malachi*, Berlin, 1846, ff. 105b-106a, and Abraham Angel, *Pituhe Hotam*, Saloniki, 1819.

⁹² Prov. 1.2, Prov. 23.24 says that a father may rejoice when his son is both righteous and wise. With respect to the verse "he that begetteth a wise child shall have joy of him," R. Levi remarks, that Scripture teaches us here that a father, who has a son laboring in the Torah, is filled with mercy for him, (Genesis Rabbah 63.1, cf. the reading which is given correctly in the Yalkut). It seems that R. Levi interpreted the Hebrew *Yismah* as if it were written *Yishmah* meaning, to be gentle, as Perles noted with reference to *Yismah* in Isa. 9.16, cf. *R. E. J.*, (1897), 63-64.

⁹³ Midrash Prov., ed. Buber, p. 42.

⁹⁴ Baba Metsia 62a.

Duties. Suppose there were two to be saved from the sinking ship — both of them were wise men — and only one small plank, should both seize it to save themselves? Or should one give place to the other?⁹⁵ A modern writer takes exception to Scripture because "it does not contain a systematic and comprehensive statement of moral principles from which it is possible to deduce with clarity and certainty specific answers to specific questions . . . The great multitudes of man everywhere and always have demanded detailed codes of conduct . . . and no religion with a mass following is without its manuals of casuistry, its Koran, its Talmud, its Calvin's Institutes."⁹⁶

This writer is inconsistent, it seems to me, for he himself cited⁹⁷ with approval Aristotle's view that we shall not find the right rule if we look for more clearness than the subject matter admits.⁹⁸ Matters concerned with conduct and what is good for us have no fixity; the agents themselves must in each case consider what is appropriate to the occasion.⁹⁹ In very deed, the attempt to turn moral principles into specific directives would lead to casuistry, while the endeavor to individualize the application of legal rules would actuate arbitrary judicial decisions.¹⁰⁰ Therefore the rabbis tried to steer clear from the pitfalls of moral theology. They were aware, as Alexander Pope put it, that to dispute over small points, diminished rather than advanced the theory and practice of morals.

This fate befell Christian ethics when it tried to become too specific, as Kirkpatrick wrote: "Christian ethics, like Christian theology, fell under the blight of medieval scholasticism . . . Christian morality was elaborated into a legal system more cumbrous and wearisome than ever the Mosaic code had been."¹⁰¹

⁹⁵ Cicero, *De Off.*, III.23.90, and E. Cahn, *The Moral Decision, Right and Wrong in the Light of American Law*, Bloomington, 1955, pp. 61 ff. Cf. also M. Mandelbaum, *The Phenomenology of Moral Experience*, New York, 1955.

⁹⁶ Lippmann, *Essays on Public Philosophy*, Boston, 1955, pp. 147, 149.

⁹⁷ *Loc. cit.*, p. 145.

⁹⁸ *N. E.*, I.3, 1, (1094b, 25).

⁹⁹ *N. E.*, II.2.4. (1104a, 9).

¹⁰⁰ Pound, *Law and Morals*, p. 70.

¹⁰¹ Hastings, *Dictionary of the Bible*, I, 469a. A multitude of laws, says

The rabbis developed an original ethical philosophy of *As if* by which they graded the relative significance of virtue and vice, godliness and sin.¹⁰² Thus one who closes his eyes to charity is *as if* he worshipped idols,¹⁰³ whereas one who conducted himself with humility is considered *as if* he offered all the sacrifices.¹⁰⁴

While moral considerations may never be excluded in the actual administration of justice, yet they can not be given legal efficacy if they will impair the general security by unsettling the legal system as a whole. As a fifteenth century lawyer said: "Some things are for the law of the land, some things are for the chancellor and some things are between a man and his confessor."¹⁰⁵ Neither can all conflicts that law must decide be settled by resorting to moral precepts. If one of the parties subsequent to a marriage, develops a chronic disabling illness or is deprived of sight or limb, that proves frustrating to nuptial felicity, is there an ethical principle which can solve this problem?¹⁰⁶ Suppose a person takes marble belonging to another and makes a statue out of it. To whom does the statue belong? The legal principle involved in this matter was debated by the Jewish and Roman jurists of the early centuries of the common era and developed into the doctrine known as *Shinuy Koneh*, or *Specificatio* in their respective systems of jurisprudence.¹⁰⁷ American Judges were forced to discuss this problem as early as 1829.¹⁰⁸ Similarly, suppose a person borrowed money and changes took place in the monetary system before the debt

Ihering, results in a minimum of morality, cf. *Geist des Römischen Rechts*, I, 4th ed., Leipzig, 1878, p. 70.

¹⁰² Cf. H. Vaihinger, *Die Philosophie des Als Ob*, Leipzig, 1920. The term *Ke'ilu* is as elastic in meaning in Hebrew as *quasi* is in Roman Law. For the latter, cf. Heumanns *Lexikon* and Berger, *Dictionary of Roman Law*, s. v. *Quasi*. In the legal text of the Talmud, the terms *Na'aseh ke* and *Ke'ilu* often express a legal fiction, cf. for example Baba Metsia 34a and M. Yebamot 13.3.

¹⁰³ Baba Batra 15a.

¹⁰⁴ Sotah 5b.

¹⁰⁵ Pound, *Law and Morals*, p. 64.

¹⁰⁶ *Eben ha-Ezer*, 154.4.

¹⁰⁷ Tosefta Baba Kamma X.4, p. 366, cf. my "Specificatio in Jewish and Roman Law," in *RIDR* 1958.

¹⁰⁸ Cairns, *Legal Philosophy from Plato to Hegel*, pp. 91-92 and Pound, *Justice according to Law*, p. 7.

became due. How is the payment to be effected? According to the current value or the metallic value or the nominal value of the money. This was an issue which engaged the serious attention of two Babylonian scholars of the third century.¹⁰⁹ The same problem also exercised the ingenuity of the philosopher Kant. This is what he has to say: "When the currency in which it is covenanted that a debt should be paid has become depreciated in the interval between the covenant and the payment, the creditor may have an equitable claim to be reimbursed; but it is impossible that a judge should enforce it, seeing the creditor has got that for which he bargained and nothing was said in the contract of such a contingency."¹¹⁰

Yet, when all is said and done, moral principles must underlie the statutes as far as is humanly possible. The antithesis "it is unjust but legal," or it is only an infraction of ethics, but no violation of the law, can be the source of a great impediment to good government. In other words, when laws are on the statute books which are patently unjust, not only are individuals injured but society suffers as well.

As we have noted, justice is the means by which a sound legal order is made to prevail.¹¹¹ Now justice is a major word in human discourse, and as Homer has said: "Great is the power of words, words will make this way and will make that way."¹¹² "Behold, eloquence is bewitching," says Judah Ha-Levi.¹¹³ Now the equivocal uses of the term justice are so closely connected that the equivocation is not easily detected.¹¹⁴ Some maintain that

¹⁰⁹ Baba Kamma 97a-b.

¹¹⁰ Quoted by Pound, *Law and Morals*, p. 98.

¹¹¹ With respect to Public ethics, the rabbis expected officers of the community to be above suspicion (Shekalim III.2). One is reminded of the remark of Caesar: "Because I maintain that the members of my family should be free from suspicion as well as from guilt" (Suetonius, *Caesar*).

¹¹² Quoted by Santayana, *Dominations and Powers*, New York 1953, p. 140.

¹¹³ Cf. Cuzari, II.55, which was mistranslated by Hirschfeld, pp. 116-117, as was noted by Goldziher, *Z. D. M. G.*, 41.693.

¹¹⁴ *N. E.*, V.1.6-7 (1129a 27). Cf. Stanford, *Ambiguity in Greek Literature*, 1939. Ambiguity arises out of many causes, but chiefly from the fact that one word often signifies different ideas, and that the same idea may be expressed by different words, cf. also Empson, *Seven Types of Ambiguity*, New

while the laws of nature are immutable, as fire burns both here and in Persia, the rules of justice are seen to vary.¹¹⁵

With respect to law, one may distinguish different kinds of justice, distributive and corrective justice.¹¹⁶ By distributive justice is meant that every man receive what is due to him before an impartial tribunal.¹¹⁷ The frequent designation in Scripture of God who is the impersonation of justice¹¹⁸ as rewarding or punishing man according to his due, shows clearly that justice was conceived as giving every man his desert. "I shall recompense them according to their deeds, and according to the works of their hands"¹¹⁹

York, 1955. As an example of ambiguity we may cite the statement of the Athenian that all things which belong to justice are beautiful, "Concerning justice in general, and *men, things or actions* that are just, we all agree that these are all beautiful, so that no one would be regarded as saying what was wrong even if he should maintain that just men, however ugly in body, are quite beautiful in respect of their very just character." (Plato, *Laws*, IX.859D). Incidentally, Plato anticipates Gaius, who classifies all law into persons, things, and actions, cf. Buckland, *A Text-Book of Roman Law*, 1932, p. 57, note 1. In Hebrew, *Yafeh* meaning beautiful, is used quite often in the same meanings that the Greek *καλός* possesses. Thus David asks his teacher "Have I argued the law beautifully?" (*Yafeh Danti*) i. e., justly, cf. Berakot 4a. Again with respect to the man who forbade his wife under vow to enjoy any benefit from him until she shows some "Beautiful blemish" to R. Ishmael ben R. Jose. After the Rabbi learned that the woman was physically ugly in every respect, he inquired about her name and he was told, that it was *Laklokil*, which means Tarnish. Whereupon the Rabbi declared, he has seen the "beautiful blemish" in her, because she is beautifully, i. e., justly, called *Laklokil*, cf. Nedarim 66b.

¹¹⁵ *N. E.*, V.7.3 (1134b, 25-26), cf. also Pound, *Law and Morals*, p. 4, note 8.

¹¹⁶ Cf. Hamburger, *Morals and Law*, pp. 44 ff., and *Juridical Review*, vol. 64, p. 186.

¹¹⁷ Dalman, *Die Richterliche Gerechtigkeit im alten Testament*, Berlin, 1897.

¹¹⁸ God is termed the *Tsadiko shel Olam*, the righteous one of the world, Genesis Rabbah 49.9 (p. 510) or *Tsadik Olamim*, i. e. the righteous ruler of the worlds (Yoma 37a and gloss of Chajes *ad loc.*). "And let us all pay heed to the law of God most high, who is the most just of all on earth, cf. *Sibylline Oracles*, 3.719. God, unlike earthly rulers, is the first to obey his own laws, Y. Rosh ha-Shanah I.3 (57a), cf. A. Brüll, *Fremdsprachliche Redensarten*, Leipzig, 1869, p. 18, Krauss, *Griechen und Römer*, Vienna, 1914, p. 60, and Lieberman, *Greek in Jewish Palestine*, New York, 1942, pp. 37-38.

¹¹⁹ Jer. 25.14 and I Sam. 24.18.

Similarly, the poet Simonides says that justice is rendering to each his due.¹²⁰ Owing to the rarity of banks in antiquity, returning a deposit, was considered a typical instance of just behavior.¹²¹ This notion underlies a story in the Palestinian Talmud¹²² concerning a person who deposited an object with an acquaintance of his. When the owner requested the return of the deposit, the friend denied the transaction. Whereupon the owner exclaimed: "Never did I trust you, it was the phylacteries I saw you were wearing on your head that I trusted."

The view of Simonides is clearly reflected in the famous definition of justice formulated by Ulpian:¹²³ "Justice is the constant and perpetual desire to give to everyone that which he is entitled to." (*Justitia est constans et perpetua voluntas ius suum cuique tribuendi.*) The principle of giving every man his due does run up against difficulties in a complex industrial society such as ours where power and authority cannot be separated. As Niebuhr neatly put it:¹²⁴ "If superior abilities and services to society deserve special rewards it may be regarded as axiomatic

¹²⁰ Plato, *Republic*, I.331e, cf. also Philo, *Spec. Leg.* IV.57, and Hirzel, *Themis*, p. 186, note 1. Shorey points out that "the Platonic Socrates ironically treats the poets as inspired but not wise because they cannot explain their fine sayings (cf. Boaz Cohen, "Letter and Spirit in Jewish and Roman Law," in the *Mordecai M. Kaplan Jubilee Volume*, p. 117, note 48). He always assumes that the utterances of "wise" men must be true. But they are often obscure, and he reserves for himself the right of interpretation. Since the poets contradict one another, and cannot be cross-examined, they are not to be taken seriously by the authorities." (Plato, *Republic*, vol. I, p. 21, note d). Mr. Justice Wilson remarked that God "is under the glorious necessity of not contradicting himself" (Pound, *Law and Morals*, p. 9, note 22) a view which is not accepted by Kierkegaard in his *Fear and Trembling*, New York, 1954, p. 46. Cf. also the contradiction about seeing God, cf. *Guide des Égarés*, II.39, Arabic text, f. 84b, French tr., p. 303.

¹²¹ Philo, *Spec. Leg.*, IV.67 and Isocrates, *Panegyricus*, 188.

¹²² Y. Berakot, II.4, Ratner, pp. 42-43, and *Semag*, Positive Precepts 3, ed. Kopy, f. 1c.

¹²³ Digest I.1.1.10 pr., cf. Z. S. S. 49.575. The modern idea of justice is derived from *δικαιοσύνη* by way of Greek philosophy and Roman law, cf. Dodd, *The Bible and the Greeks*, p. 42.

¹²⁴ *Moral Man and Immoral Society*, 1932, p. 8. That a philosopher should converse especially with men in power, cf. Plutarch, *Moralia*, 776 B.

that the rewards are always higher than the services warrant. No impartial society determines the rewards. The men of power who control society grant these perquisites to themselves. Whenever special ability is not associated with power, as in the case of the modern professional man, his excess of income over the average is ridiculously low in comparison with that of the economic overlords, who are the real centres of power in an industrial society."

Justice Holmes who was possessed of a keen sense of justice, and had a profound comprehension of the contemporary social order, recognized incisively that "One of the eternal conflicts out of which life is made up, is that between the effort of every man to get the most he can for his services, and that of society disguised under the name of capital, to get his services for the least possible return."¹²⁵

Injustice¹²⁶ was regarded by the ancient Hebrews as a disturbance of the equilibrium in human relations, which could only be restored by the dispensing of justice. Like the ancient Egyptians,¹²⁷ who employed the term scales and balance as a metaphor for divine justice, meting out impartial decisions, the author of Proverbs, too, speaks of the scale and balance as emblems of God's justice.¹²⁸ Anaximander had the conception

¹²⁵ Cf. M. Lerner, *The Mind and Faith of Justice Holmes*, Boston, 1943.

¹²⁶ E. Cahn, *A Sense of Injustice*, New York, 1949.

¹²⁷ Cf. P. Montet, *La vie quotidienne en Egypte au temps des Rames*, Paris, 1947, pp. 148-149. A reflection of this concept may be detected in a medieval Jewish legend according to which Pharaoh dreamed of an old man with a balance in his hand containing all the great men of Egypt in one scale and a kid in the other, cf. *Sefer ha-Yashar*, Venice, 1624, pp. 128a-b, cf. also Abot II.8.

¹²⁸ Prov. 16.11. The import of this verse is best conveyed by the rendering of the Vulgate: *Pondus et statera judicia Domini sunt*, which presupposes in the Hebrew text *Peles u-Moznaim*. Rashi comments as follows: "God recompenses a man according to his deed, *Mishpat* is equivalent to *justice* in French. Man is punished for his sins with scale and balance." This explanation is partly reminiscent of the Syriac: *be-Mathkala de Masatha Dinah de-Marya*, which presumes the reading in the Hebrew, *be-Peles Moznaim*. The Septuagint's rendering 'Ποπή ζυγοῦ δικαιοσύνη παρὰ κυρίῳ, "The equilibrium of the balance is righteousness with God," presupposes the reading *Peles Moznaim*, but nonetheless does not change the sense of the Masoretic text, which is

of a balance of forces in nature which he expressed through the term *Diké*, which in a different context means justice.¹²⁹ *Justitia* is represented by the Romans as a goddess holding a balance and scales.¹³⁰ Note also the view of Aristotle, who observed that a just man is one who is law abiding and one who is fair,¹³¹ ὁ τὰ νόμιμος καὶ ὁ ἴσος. The unjust man takes more than his due and is unfair,¹³² ὁ πλεονέκτης καὶ ἄνιστος.

Secondly, there is corrective justice. With regard to the redress of wrongs committed by man against his fellow, the principle of retaliation formulated in Lev. 24.19 "As he did, so shall it be done to him" was accepted in principle as a general rule in antiquity. Thus, too, the Pythagoreans deemed justice to be simple reciprocity¹³³ which Aristotle noted, was in many instances at variance with justice.¹³⁴ The rabbis interpreted this principle as compensation because a consistently strict application of the rule would lead to the violation of the intent and purpose of the law.¹³⁵ The Hebrew term for reciprocity is *Gemul*,

only followed in the Aramaic version. For the balance of justice ῥοπή δίκης, cf. Aeschylus, *Choephoroi*, 61, cf. also Rashi to Rosh ha-Shanah, 17a, s. v. *Kobesh* and s. v. *Noseh*.

¹²⁹ Cf. Kitto, *The Greeks*, p. 180. For representations of the Greek god *Kairos* with a balance in his hand, cf. Jean Gage, "Le Balance de Kairos et l'épée de Brennus," *Revue Archéologique*, 1954, pp. 146-150 (I am indebted for the latter reference to Prof. Bickermann), and Daube, "Scales of Justice," *Juridical Review*, 63 (1951), 113-114. For the δίκης τάλαντα, cf. Hirzel, *Themis*, p. 228, note 1.

¹³⁰ Cf. G. Kisch, *Recht und Gerechtigkeit in der Medaillenkunst*, Heidelberg, 1955, p. 54, n. 2. For the late Medieval representation of *Justicia* as a blindfolded goddess holding a scale and balance, cf. Ernst von Möller, "Die Augenbinde der Justitia," *Zeitschrift für christliche Kunst*, 18, 1905, pp. 107 ff., and pp. 142 ff., cited by Kisch, *loc. cit.*, p. 121, note 58.

¹³¹ *N. E.*, V.5, 8 (1129a, 34).

¹³² Maimonides translates *Tsaddikim* in Deut. 4.8 by *Muta'dilat*, which Ibn Tibbon renders by *Shavim*, (*Guide des Égarés*, II.39). This corresponds to *Isos* in Aristotle's *Ethics*, cf. previous note. In the piyyut *Ha-Ohez be-Yad*, God is termed *ha-Shaveh*, i. e., the Just One, cf. also Ben Yehudah, 14.6955.

¹³³ *N. E.*, V.5.1 (1132b), cf. Hirzel, *Themis*, p. 193.

¹³⁴ *N. E.*, V.5.4, (1132b, 28).

¹³⁵ For the omission of any reference to *Talion* in Philo, cf. Heinemann's *Philons griechische und jüdische Bildung*, p. 357, note 3, and Belkin, *Philo*

and God is termed in Scripture a God of recompense.¹³⁶ The principle of reciprocity to this very day constitutes the essence of the unwritten law that governs individuals in their private relations with one another,^{136a} and it passes as the unchallenged principle of international law which all civilized nations proudly practice without compunction or scruples. The ultra-violent reaction of the gospels¹³⁷ to the legal principle of retaliation with an extremely pacifist unworldly ethic of non-resistance to evil would have struck the rabbis of the Talmud as an unrealistic interpretation of a goal realizable only by a few saints on earth, for the Torah was not intended for angels.¹³⁸ Although the law (*Shariah*) is not natural in (origin), says Maimonides, it is concerned with natural matters.¹³⁹ "Only a morality frankly relative to man's nature is worthy of man."¹⁴⁰

The Hebrew legislator and the prophets deemed the essence of justice¹⁴¹ to lie in the protection of the weak¹⁴² in their natural rights.¹⁴³ This notion underlies the humanitarian laws of the Pentateuch. For the strong can protect themselves. Did not the cynical Thrasymachus dare to suggest to the sardonic Socrates

and the Oral Law, pp. 96–103. For Talion in Seneca, cf. Stampa Braun, *Las Ideas Penales Y Criminológicas De L. A. Seneca*, Valladolid, 1950, pp. 52–55.

¹³⁶ Jer. 51.66, cf. also Jer. 17.10, 25.14, Isa. 3.11 and Joel 4.4, 9. The principle of reciprocity is sometimes denoted by the phrase "measure for measure", (Sotah I.7). This phrase occurs in the Gospels too, "With what measure ye mete, it shall be measured unto you again," Matt. 7.2. For the statement "Render to Caesar all their dues," cf. Hirzel, *Themis*, p. 200, note 2. Cf. also Kennard, *Render to God*, New York, 1950.

^{136a} Cf. Prov. 24.29 which opposes the application of this principle in social relations.

¹³⁷ Matt. 5.38–40. For Lycurgus' treatment of the person who blinded him in one eye, cf. Epictetus, *Fragmenta* 5, ed. Loeb Classics, vol. II, 445–446, cf. also Kittel, *Religion des Spätjudentums*, pp. 32–33.

¹³⁸ Yoma 30a.

¹³⁹ *Guide des Égarés*, II.40.

¹⁴⁰ Santayana, *Genteel Tradition at Bay*, pp. 73, 74.

¹⁴¹ H. H. Walz and H. H. Schrey, *The Biblical Doctrine of Law and Justice*.

¹⁴² Jer. 31.11. Hammurabi claimed that one of the objects of his Code was that the strong may not injure the weak, cf. Driver and Miles, *The Assyrian Laws*, 1935, p. 218, note 1.

¹⁴³ But cf. Leo Strauss, *Natural Right and History*, Chicago, 1953, p. 81.

that justice might be to the advantage of the stronger¹⁴⁴ by which he meant that the ruling class legislated in its own interest. It would be as if one did set the fox to keep the geese. The Psalmist reproached those persons who frame mischief by statute,¹⁴⁵ and the Prophet castigated those persons who concocted the statutes of Omri.¹⁴⁶

Just because man is unequal by reason of accident of birth, capacities and circumstances, the Torah ruled that all men should be treated equally before the law.¹⁴⁷ "Both he that is home-born among the children of Israel, and the stranger that sojourneth among them: ye shall have one law for him that doeth aught in error."¹⁴⁸ Of the Pentateuchal law, it may be said, to use the language of Pericles: "Its administration favors the many instead of the few, this is why it is called democracy. If we look to the laws, they afford equal justice to all in their private differences."¹⁴⁹

¹⁴⁴ *Republic*, I.338. Cf. also W. Roscher, *Politik, Geschichtliche Naturlehre der Monarchie, Aristokratie und Demokratie*, 3rd ed., Stuttgart, 1908.

¹⁴⁵ Ps. 94.20.

¹⁴⁶ Micah 6.16.

¹⁴⁷ Consequently, if a heathen demanded from a group to defile a single Jewess or to kill a single Jew from among them in order to save the rest, the principle of equality of human life required that they all submit to be defiled or killed rather than subject one to abuse or death, cf. Lieberman, *Tosefta Ki-Fshutah, Zeraim*, New York, I (1955), 420-423, and Atlas in *H. U. C. A.*, 27 (1956), Hebrew part, p. 3, note 8. For the Greek view of the equality of rights, cf. Hirzel, *Themis*, p. 240, and Vlastos, "Equality and Justice in Early Greek Cosmologies," *Classical Philology*, 42 (1947), 156-182.

¹⁴⁸ Num. 15.29. "To be equal before the law," says Wilhelm Roscher, "means that the rights of all are equally sacred, but not that they have equal content. One who holds no land, can only practice agriculture as a tenant-farmer . . . In a certain sense all men are equal before God," cf. "Umriss zur Naturlehre der Demokratie" in *Abhandlungen der philologisch-historischen Classe der königlich sächsischen Gesellschaft der Wissenschaften*, Leipzig, 1890, vol. 11, pp. 664, 721. Cf. also Finkelstein, "Human Equality in the Jewish Tradition," *Conservative Judaism*, X (1955), 2-27. And Santi Romano, *Frammenti di un Dizionario Giuridico*, Milan, 1947, p. 126.

¹⁴⁹ Thucydides, II.37.

But when the laws are written, then the weak
And wealthy have alike but equal right,
Yea, even the weaker may fling the scoff
Against the prosperous if he be reviled.

Euripides, *Suppliants*, 429 ff., Way's translation.

One of the prime prerequisites in a just legal order, is freedom for the individual to fulfil his natural capacities, propensities, and potentialities. Liberty was highly prized by the rabbis of the Talmud. Yet the term liberty is infrequent in their writings because in their time, Israel was a dependency of Rome or under the rule of Persia. Therefore pronouncements on liberty would have been misunderstood by the Romans or the Persians as a form of rebellion.¹⁵⁰ Nevertheless freedom was an integral concept in Jewish thinking. Judaism taught that man is free to choose good and evil, else it would be unjust to punish him for his transgressions.¹⁵¹ Indeed, the birth of the Jewish nation is celebrated by the festival of freedom, commemorating the emancipation from Egyptian bondage.

The rabbis expressed their views on liberty¹⁵² in a fanciful interpretation of the phrase "*Ḥarut al ha-Luhot*" in Ex. 23.16. In a play upon the phrase "Engraven upon the tablets," Rabbi Aḥa ben Jacob remarked: Read not *Ḥarut* (engraven) but *Ḥerut* (Liberty) on the tablets. The sage meant to say that a person is only truly free who observes the tablets of the law.¹⁵³ This

¹⁵⁰ For the term *Ḥerut* on Jewish coins, cf. Schürer, *Geschichte des Jüdischen Volkes*, I, 4th ed., 766, 767, and Yevin, *Milḥemet Bar-Kochba*, Jerusalem, 1952, pp. 81, 85. For the concept of liberty in Germanic law, cf. Kurt Jäckel, "Libertas. Der Begriff der Freiheit in den Germanenrechten," in *Geschichtliche Landeskunde und Universalgeschichte, Festgabe für Hermann Aubin*, 1950, p. 55.

¹⁵¹ Cf. H. Vaihinger, *The Philosophy as If*, London, 1933, p. 43. That man is not completely free is implied in Berakot 31b-32a and Erubin 65a. For the sway of fate, cf. the story of R. Eleazar in Ta'anit 25a. For Plato's views on man as a moral agent, cf. J. Gould, *Development of Plato's Ethics*, 1955. For the Islamic view, cf. E. Mainz, "Mu'tazilitische Ethik," *Der Islam*, 22 (1935), 191-206.

¹⁵² Erubin 74a.

¹⁵³ Philo's treatise on the topic that "Every good man is free" is of course stoic in origin. Only the educated are free, says Epictetus, cf. *Discourses*, II.1.23, ed. Loeb Classics, vol. I, p. 219. The same notion underlies the statement in the Gospels: "You shall know the truth, and the truth shall make you free . . . Whosoever committeth sin is the servant of sin," John, 8.32, 34; cf. also the view concerning the perfect law of liberty, James 1.25, 2.12. Seneca remarks that only wisdom gives a man his liberty, *Moral Epistles*, 88.2. Even the blind man who studies Torah is called a free man, cf. Genesis Rabbah 92.1.

seems to be a contradiction in terms, since law is essentially a system of restraints. Besides a veiled polemic against Paul's doctrine of the bondage of the law, emphasis is put on the concept of liberty under the law. Liberty without law results in license and anarchy. Rabbi Aḥa was saying more or less the same thing as the Roman jurisconsult Florentinus¹⁵⁴ when he defined liberty as the natural power of doing whatsoever one wishes to do unless one is prevented in some way by force or by law.

As an example of the restriction of man's liberty by law we may cite the legal maxim: *Sic utere tuo ut alienum non laedas*,¹⁵⁵ use your own in such a manner that you will not harm another's property. This rule is fully recognized in the Mishnah¹⁵⁶ by the imposition of a number of restraints in connection with neighboring land owners. Did not Aristeas say "Our law commands to do harm to no man in word or deed."¹⁵⁷

Man should be conscious that his liberty is being curbed by the law and thereby attain to perfect self-discipline. This is intimated in the statement of R. Eleazar ben Azariah:¹⁵⁸ "Whence do we know that one should not say: I am loath to wear garments of two kinds of stuff mingled together, to partake of pork or to commit incest, but one should rather say: I would fain do these things, but what can I do, my father who is in heaven prohibited these things, as it is written: 'I have separated you from the peoples that you should be mine. Consequently one who turns away from sin accepts the kingdom of heaven.' " Since Jewish ethics rests upon divine sanction,¹⁵⁹ therefore when human

¹⁵⁴ Digest, I.5.4, cf. my "Letter and Spirit in Jewish and Roman Law," *Mordecai M. Kaplan Jubilee Volume*, p. 122, note 82, von Lübtow, *Blüte und Verfall der römischen Freiheit*, Berlin, 1953, Z. S. S., 71 (1953), 418 ff.

¹⁵⁵ Blackstone, *Commentaries on the Laws of England*, vol. I, p. 306.

¹⁵⁶ Baba Batra, ch. II.

¹⁵⁷ *Letter of Aristeas*, 168.

¹⁵⁸ Sifra, ed. Weiss, f. 93b, Yoma 67b and *Yefeh Enayim*, *ad loc.* and Maimonides, *Eight chapters*, ch. VI, ed. Gorfinkle, p. 36.

¹⁵⁹ Maimonides maintained that a Gentile who observed the seven Noachian laws because they were divinely revealed, belonged to the company of Gentile saints, but if he observed them merely because they were in conformity with

law comes into conflict with the divine law, man must obey God, who is the master, rather than his fellow man, who is merely God's disciple,¹⁶⁰ so to speak. For you should know that God ruleth in the kingdom of men.¹⁶¹

Freedom, too, consists of liberty from political oppression,¹⁶² an opinion that the Palestinian authorities had to utter with great caution. The Jew prays thrice daily "Sound the great Shofar for our freedom."¹⁶³ Liberty consisted also in the freedom from the fear of death, an opinion some of the rabbis¹⁶⁴ shared in common with the Stoics, especially Seneca.¹⁶⁵

A just legal order requires a fair execution of the laws by

reason, then he belonged only to the company of the wise among the Gentiles. (*Hilkot Melakim*, 8.11, the correct text reads "Ela" instead of "We-lo" as is found in several manuscripts). Spinoza quoted in Hebrew this passage from Joseph ben Shem Tob, *Kebod Elohim*, Ferrara, 1556, (last page) which agrees with the printed edition and translated it as follows: *Omnis, qui ad se suscipit septem praecepta . . . sed si ea a ratione ductus exequutus fuerit, hic non est incola, nec ex piis, nec ex scientibus nationum* (*Tractatus Theologico-Politicus*, 1674, p. 95).

¹⁶⁰ Kiddushin 42b, cf. also Boaz Cohen, "The Principle of Causation in the Jewish and the Roman Law of Damages," in *Studi in onore di Pietro de Francisci*, vol. I, p. 326, N. C. H. Dunbar, "Superior Orders in the Law of War," *Juridical Review*, 63 (1951), 234-261 and Jane E. Ruby, "The Ambivalence of St. Thomas Aquinas' View of the Relationship of Divine Law to Human Law," in *The Harvard Theological Review*, 48 (1955), 101-128. Cf. also Daube, *The Defense of Superior Orders in Roman Law*, Oxford, 1956, and Kaser, *Z. S. S.* 74 (1957), 431-433.

¹⁶¹ Dan. 4.29.

¹⁶² *Leviticus Rabbah* 18.3, ed. Margulies, p. 407. In the future, when Israel will be free from the Kingdoms, i. e., Gentile suzerainty, the redemption from Egypt will pale into insignificance in comparison therewith, cf. *Tosefta Berakot* I.12 and parallels.

¹⁶³ Elbogen, *Der Jüdische Gottesdienst*, p. 33.

¹⁶⁴ The rabbis carefully clothed this concept in an allegory, namely, that death would have been abolished for the Jews after the revelation if they did not commit the sin by worshipping the golden calf, cf. the remarks by R. Samuel Jafe Ashkenazi to *Exodus Rabbah* 32.1. In *Berakot* 5b it is stated that a person need not reflect on death unless an evil impulse is getting the better of him, cf. also Abot, II.1. For *memento mori*, cf. Martial, *Epigrams*, 2.59.3, Lucretius, *De Rerum Natura*, 3.929, and Herodotus, 2.78.

¹⁶⁵ Moral Epistles, 4.3, and 24.5, and Epictetus, *Discourses*, II.1.13, *Encheiridion* 21.

impartial judges,¹⁶⁶ not susceptible to bribes. To dispense justice says Aristotle, is a harder task than to know what medical treatment will produce health.¹⁶⁷ The legal order, says Paulsen,¹⁶⁸ is a mechanism, the function of which is to compose existing conflicts of interest, to allow for the freest exercise of the human capacities with the least injury to those interests. The more perfectly a legal order accomplishes this, the more clearly it realizes the purpose of law and what ethics demands of law. No legal system can ever attain this goal absolutely. For it is in the nature of mechanism to act mechanically, and not according to particular cases. A system in which each case was decided individually would in reality be no law. For law to be law must be universally applied. Only when there are general rules can the individual be protected from arbitrariness. The safety of the individual depends upon uniformity so that the individual can know and do what is right with certainty and ease.

The legal order resembles the natural order when uniformity rules. If in nature events happened according to caprice, it would be unknowable, and adaptation to its workings would be impossible. But just as the uniformity of nature is fatal to our purposes in particular instances, for the law of gravitation may occasion injury or death, so precisely the same may be said of the legal order. As a rule, a sound legal order tends to produce what is right, but things do occur in which the moral law is outraged by positive law. This results from the uniformity of law. Law carried to extremes is the height of injustice, or as Cicero put it, *summum ius summa iniuria*.¹⁶⁹ An unbending adherence to the strict law and to its letter¹⁷⁰ would result in

¹⁶⁶ Cf. Sanhedrin 105b and Genesis Rabbah 55. Themistocles allowed himself to be bribed from good purposes. (*Herodotus*, VIII.4 ff.).

¹⁶⁷ *N. E.*, V.9, 15, (1137a, 12-14).

¹⁶⁸ Paulsen, *System of Ethics*, pp. 627-628, *Guide des Égarés*, II.40.

¹⁶⁹ Cicero, *De Officiis*, I.33. Cf. Boaz Cohen, "Letter and Spirit in Jewish and Roman Law," *op. cit.*, p. 132. Kisch, *Festgabe für August Simonius*, Basel, 1955, p. 202, n. 14, and Pasquali, *Rivista di Filologia*, 55 (1927), 228-232.

¹⁷⁰ Baltasar Gracian put it this way: *El sumo derecho se hace tuerto*, Justice to excess becomes a wrong. Cf. *Oracula Manual*, ed. Walton, New York, 1953, pp. 110-111.

stark injustice and in a violation of the spirit of the law. As Anatole France phrased it: "Justice, in strict impartiality, prohibits the poor as well as the rich from sleeping under a bridge." And yet, "despite its inconsistencies¹⁷¹ and crudities, law still embodies the expression of man's conscience," which gave rise to numerous exhortations in Scripture to execute law with justice, *Mishpat u-Tsedakah*.¹⁷² The rabbis tell us that God created the world with law but when he saw that it would not be able to exist, he added also justice.¹⁷³

The principle of equity was denoted by several terms in Scripture.¹⁷⁴ The rabbis who were also sensitive to this moral issue, found allusions to equity in the Pentateuch,¹⁷⁵ and formulated the doctrine of equity as *Lifnim mi-Shurat ha-Din*, i. e. within the line of justice. Many instances cited in the Talmud consist of cases where the individual of his own accord acted in harmony with the spirit of equity.¹⁷⁶

However, there are instances where the tribunal would pronounce decisions in agreement with equity. Thus, in a trans-

¹⁷¹ Law is not always consistent, cf. Yebamot 108a.

¹⁷² Cf. Bruce, *Ethics of the Old Testament*, Edinburgh, 1895, Westermarck, *Origin and Development of Moral Ideas*, London, II (1908), 97-99, J. M. Powis Smith, *Moral Life of the Hebrews*, Chicago, 1923, and Hobhouse, *Morals in Evolution*, London, 1951, pp. 492-496.

¹⁷³ Cf. Genesis Rabbah XII.15, pp. 112-113. According to Philo (*Cherub*. 10 and *Vita Mosis* III.8 as well as *Midrash Tadshe*, ed. Epstein, p. 15) the two cherubim represent goodness and authority, or what the rabbis call justice and mercy, i. e. *Din* and *Rahamim*; cf. Sifre Deut. 26 and Cohn, *Die Werke Philos*, I, 1909, pp. 19-20, Ginzberg, *Legends*, VI, 44, note 241, Wolfson, *Philo*, I, 224, II, 136, and Zucker, R. Mubashshir's *Critique of R. Saadya*, 1955, p. 118, note 295. Cf. also Hagigah 14a.

¹⁷⁴ Such as *Tsedakah*, *Mesharim* and *Mishpat Emet*. The thought conveyed by this phrase is the same as that expressed by Seneca: "Hand down your opinion, then, O judge; state who seems to you to say what is truest, and not who says what is absolutely true. For to do that is as far beyond our ken as truth itself." (*Moral Epistles*, 65.10). Cf. the Rabbinic saying: "A judge decides in accordance with the truth as he sees it," Sanhedrin 6b and parallels.

¹⁷⁵ For example, in Ex. 18.20 and Deut. 6.18.

¹⁷⁶ Cf. Boaz Cohen, "Letter and Spirit in Jewish and Roman Law," *op. cit.*, pp. 130-131, and Strack, *Commentary on Matthew*, p. 341. Whether a Beth Din must always enforce a rule in accordance with equity, see Isserles in *Hoshen ha-Mishpat*, 12.2 and *Pitḥe Teshubah*, *ad loc.*

action, where one party stands to gain, and the other party is in no hazard of losing anything, the latter is constrained to yield on the grounds of equity, and may not insist on the Sodomitic principle of strict law.¹⁷⁷ According to an ancient rabbinic interpretation, the people of wicked Sodom¹⁷⁸ committed injustice by insisting strictly upon their rights without regard to a feeling for fairness.¹⁷⁹

Justice is also furthered by the introduction of the principle of judicial discretion. It gives an opportunity to the judge to exercise judgment in pronouncing a decision and in imposing a penalty in accordance with the circumstances of the case which adherence to an arbitrary ruling would not permit.¹⁸⁰

Justice is also promoted by the infusion of moral principles into the law, such as that man is innocent until he is proved guilty,¹⁸¹ or that man can not be made to incriminate himself.¹⁸² The principle of individual responsibility for crime and sin established by the prophets, rules out the possibility of guilt by association.¹⁸³

¹⁷⁷ Baba Batra 12b. With regard to the application of this principle to *Halitsah*, cf. *Sheyare Korbán* to P. Yebamot IV.12, s. v. *Mahu*. For the Talmudic maxim, "The one profits while the other loses nothing," cf. also a similar notion in Cicero, *De Officiis*, I.16.52, and Daube, *Forms of Roman Legislation*, 1956, p. 62.

¹⁷⁸ Abot V.10.

¹⁷⁹ Sanhedrin 109b.

¹⁸⁰ Ketubot 94b, cf. Lampronti, s. v. *Shuda di-Dayane*, pp. 100b-101a. Gaius enumerates various *bonae fidei* actions where the iudex appears to have discretion (*libera potestas*) in deciding. Among them are actions on deposit (*depositi*), cf. Gaius IV.61-62. Note also *Inst. of Justinian*, IV.6.30 and Ferrini, *Opere*, II, 408. Now *libera potestas* is not judicial power, but judicial discretion, which is the power expressed by the courts to determine questions to which no strict rule is applicable. Similarly in Talmudic Law, judicial discretion is allowed in actions on deposit, cf. Ketubot 85b.

¹⁸¹ Ex. 23.7 and Deut. 17.4, 6. For the Stoic view, cf. Bury, *History of the Roman Empire*, New York, 1893, p. 527. The presumption of innocence came into the common Law from the Roman law via the canon law, cf. *Corpus Juris*, vol. 40, p. 1245, note 17b.

¹⁸² Cf. Sanhedrin 25a, *Enzyklopedia Talmudit* (Hebrew), I, 255-257. Lampronti, *Pahad Yutshak*, I, Lyck, 1871, ff. 127b-128a, and Hezekiah Medini, *Sdei Hemed*, I.24-28.

¹⁸³ Cf. Jer. 31.29 and Ezek. 18.2. "Often even a whole city suffers for a bad man who sins," cf. Hesiod, *Works and Days*, 240.

Cases of doubt should be resolved in favor of the accused.¹⁸⁴ A person may not benefit from a sinful or illegal act.¹⁸⁵ Many interpretations of the rabbis which apparently are a deviation from the letter of the Biblical law, were undoubtedly animated by ethical considerations.

Granted a society with a just legal order and a fair administration of the laws, an ideal situation which has seldom if ever prevailed, there still would be an excess of cruelty, suffering and injustice. For the law can not prohibit many things it disapproves, which makes it possible for a wily man to be vile without violating the letter of the law.¹⁸⁶ For a legal system attempting a total implementation of the idea of justice, would of necessity lead to the risk of an insufferable state of tyranny.¹⁸⁷

Consequently, a wide margin is open for injuries without legal redress. The law enforces the payment of a stipulated wage, but it does not enforce a just wage. The law compels a man to deliver what he has contracted to sell, but does not ordinarily institute a fair price.¹⁸⁸ In Jewish law overreaching in case of sale,¹⁸⁹ invalidates the purchase, a rule which was adopted by the Romans from Jewish law and known as *laesio enormis*.¹⁹⁰ The law punishes physical affronts¹⁹¹ but not insults.¹⁹² Slander is

¹⁸⁴ Cf. Baba Kamma 46a.

¹⁸⁵ Cf. M. Hallah II.7 and my "Betrothal in Jewish and Roman Law," in *Proceedings of the American Academy for Jewish Research*, XVIII (1949), 102, note 191. This corresponds in part to the Roman doctrine of unjust enrichment, for which see *Z. S. S.*, 71 (1954), 563.

¹⁸⁶ Nahmanides to Lev. 19.2. Laws are like spider's webs, they hold the weak and delicate who are caught in their meshes, but are torn to pieces by the rich and powerful (Plutarch, *Solon*, V.2).

¹⁸⁷ Paulsen, *System of Ethics*, p. 633.

¹⁸⁸ Cf. de Francisci, "Justum Pretium" in *Studi in onore di Ugo Enrico Paoli*, Florence, 1955, pp. 211-218.

¹⁸⁹ Baba Metsia 4.3.

¹⁹⁰ Cf. Volterra, *Diritto Romano e Diritti Orientali*, 1937, p. 225. Cf. also R. Dekkers, *La Lésion Énorme*, Paris, 1937.

¹⁹¹ Baba Kamma 8.1.

¹⁹² For *Boshet Debarim*, cf. Tur and Beth Joseph to *Hoshen Mishpat* 1 end, (ed. Vilna, f. 4b). A scholar who does not avenge insults, but who harbors resentments like Nahash, King of the Ammonites, is no true scholar, cf. Yoma 22b-23a, Shabbat 63a and Bacher, *Die Agada der Palästinenesischen Amoräer*,

punished but there are subtle ways of ruining the reputation of a man, for which no penal formula can be found. Nor does the law compel a man to give every one the honor which is due to him.¹⁹³ The rabbinic pronouncements about honoring our fellow men are merely moral maxims without sanctions.¹⁹⁴ The law punishes assault and battery,¹⁹⁵ whereas causing annoyance, arousing anger or grief or exploiting another are unpunishable offences.

The statement in the gospels¹⁹⁶ "but I say unto you, that whosoever is angry with his brother without cause shall be in danger of judgment,"¹⁹⁷ can only refer to moral judgment. While adultery is punishable, tale bearing or intriguing, by which families are disrupted, are not chastised. Stealing, in a legal sense is not only taking some one's property without his intelligent consent,¹⁹⁸ but also using¹⁹⁹ false measures and

I (1892), 120, n. 6. In Kiddushin 28a it is said: If one calls his neighbor "wicked" the latter may privately avenge himself. Cf. also Ta'anit 7b, where it is stated when it is permitted to call his fellow "wicked."

¹⁹³ Cf. Abot II.10. Cf. also M. Naudet, *De la Noblesse et des récompenses de l'honneur chez les Romains*, 1863.

¹⁹⁴ The rabbis wistfully observed: "Courtesans adorn one another, how much more must scholars be regardful of one another's honor" (Shabbat 34a), and Plato noticed that there is honor among thieves (*Republic*, 351C). Cf. Cicero, *De Officiis*, II.11, 40.

¹⁹⁵ Baba Kamma 8.1.

¹⁹⁶ Matt. 5.22, cf. also Strack and Billerbeck, *Kommentar*, I, 282.

¹⁹⁷ The phrase *ἐνοχος ἔσται τῇ κλήσει* reminds one of *veniat in iudicium* in *Digest* 16.3.1.42, for which, cf. A. Magdelain, *Les Actions Civiles*, Paris, 1954, p. 31, note 3. The use of *ἐνοχος* is indirectly influenced by Aristotle, *Rhetoric*, 2.2.27 (1380a) *καὶ τοὺς ἐναντίους τοῦτοις ἐνόχους ὄντας ἐφ' οἷς ὀργίζονται*, cf. also Philo, *Spec. Leg.* II.26, *ἐνοχος ἔστω*.

¹⁹⁸ Y. Baba Metsia II, (8a). The rabbis would not have approved of *occulta compensatio* as is evident from the story of R. Huna where it is said, "steal from a thief and you have a taste of it," Berakot 5b and Mordecai, Baba Kamma 30. For Occult Compensation, cf. Henry C. Lea, *Minor Historical Writings*, Philadelphia, 1942, pp. 169–186 and *Dictionnaire de Théologie Catholique*, Paris, III (1908), 601–604. For *Genebat Lev*, cf. Gen. 31.26 and *Iliad* I.132.

¹⁹⁹ Using false measures, legally is like theft, but one does not pay double, cf. Baba Metsia 61b, *Hilkot Genebah*, 7.2. But morally it is worse than simple theft, cf. Baba Batra 88b, *Genebah*, 7.12. For the Roman law, cf. *Digest*, 47.2.52.22. The rabbis taught that honesty is the best policy if a man wishes to become rich, cf. Niddah 70b. With regard to the rule concerning *Safeh Gezel*,

weights^{199a} and adulterating food products. Morally speaking, stealing included also deception, creating a false impression,²⁰⁰ make-believe and plagiarism.²⁰¹ With regard to the *fripier d'écrits*, Maimonides²⁰² says: "People adorn themselves with the poems of others and publish them as their own productions." Crimes of property are punished, but the notorious inventiveness of criminals who are as cunning as cuttle fish often outwits the law.²⁰³ Sly folk will percolate through the minutest loopholes in the law, as fleas will filter through the finest screen. This notion has been poetically conveyed by Oscar Wilde in a stanza of his *The Ballad of Reading Gaol*,

i. e. property concerning which there is doubt that it might have been stolen, cf. Benges, *Liflagot Reuben*, Piotrkov, vol. III, 1913, p. 18.

^{199a} Some times when a Gentile deceives with respect to agricultural products which he sells to a Jew in order to obtain a better price, a problem is created in ritual law, cf. Tosefta, Demai V.2, Lieberman, *Tosefta Ki-Feshutah*, Zeraim, I, pp. 247-248, and *Gilyon Maharsha* to Yebamot 122a.

²⁰⁰ Tosefta Baba Kamma 7.8 and parallels, for *Genebat Da'at*, cf. Gen. 31.20. Cf. also F. Schechter, "A Study in Comparative Trade, Morals, and Control," in *Virginia Law Review*, XIX (1933), 794-845, and Moshe Silberg, *Law and Morals in Talmudic Law* (Hebrew), Jerusalem, 1953, and Reines, *Torah u-Musar*, Jerusalem, 1954, and Glenn, *Israel Salanter, Religious Ethical Thinker*, New York, 1953.

²⁰¹ Cf. Tosefta Baba Kamma, VII.13 and my "Peculium in Jewish and Roman Law," *Proceedings of the American Academy for Jewish Research*, XX (1951), 151, note 84. It is not easy legally to prove plagiarism, cf. A. Lindley, *Plagiarism and Originality*, New York, 1954. Cf. also Wise, *The Improvement of the Moral Qualities*, p. 43, note 1. Cf. also *Shaare Teshubah to Oraḥ Hayyim*, 156, note 2, and E. Bernet, *Plagiat* in Pauly-Wissowa, *R. E.*, vol. 20 (part 2), 1950, pp. 1956-1997, S. Funk, "Der Schutz der geistigen Arbeit in der Halakah," *J. J. L. G.*, 18 (1927), 289-304, and P. Wittenberg, *The Law of the Literary Property*, 1956. Cf. also Frishman, כל כתבי, VIII, 2nd ed. Warsaw, 1939, pp. 118-127, and A. Perls, "Das Plagium," *M. G. W. J.*, 58 (1914), 305-322.

²⁰² *Guide des Égarés*, II.40. For plagiarism by writers on ethics, cf. Brüll, *Jahrbuch für jüdische Geschichte und Literatur*, II.165-173.

²⁰³ Cf. I Tim. 1.8, we know that the law is good (*καλὸς ὁ νόμος*) if a man use it lawfully, cf. J. W. Waite, "Judges and the Crime Burden," *Michigan Law Review*, 54 (1955), 169-198. Quintilian too informs the advocate to take advantage of the loopholes in the law, as he put it, "We must evade the charge with the aid of some point of law, making it appear that the action has been brought against us illegally."

Yet each man kills the thing he loves,
 By each let this be heard,
 Some do it with a bitter look,
 Some with a flattering word,
 The coward does it with a kiss,
 The brave man with a sword.

The rabbis observed that a cunning knave and a foolish saint are among those who can ruin the world.²⁰⁴ This calls to mind a couplet of the famous Moslem philosophical poet Abul Ala Al-Ma'arri²⁰⁵ (973–1057) uttered in a discouraging moment.

We mortals are composed of two great schools,
 Enlightened knaves or else religious fools.

This, then, is the dilemma of law and morals. Lord Moulton, in an essay on *Law and Manners*,²⁰⁶ noted that human action falls into three areas. The domain of positive law where definite law prescribes what we may do or not do. Then there is the domain of free choice. In this domain the individual has complete freedom to act as he sees fit.²⁰⁷ Between the domain of positive law and the domain of free choice, lies a third area in which neither positive law nor complete freedom prevails. Here

²⁰⁴ A cunning knave is defined as one who knowingly gives false advice, cf. Sotah 21b and Sanh. 76b. Similarly Ulpian writes: "For a wrong committed by a person, who deceives in a dangerous emergency (*decipientis in periculo*) should not be imputed to human frailty and be considered blameless," *Digest* I.18.6.7, for other passages, cf. Heumann's *Lexicon*, p. 124, s. v. *decipio*.

²⁰⁵ Cf. Nicholson, *Literary History of the Arabs*, p. 318. Isaac Arama observed that an enlightened enemy is better than a foolish friend, cf. *Akedat Yitshak*, ed. Pressburg, 1849, Introduction, I, 6b, as explained by Goldziher, *Streitschrift des Gazali gegen die Batiniyya-Sekte*, Leiden, 1916, 19, note 2.

²⁰⁶ *Atlantic Monthly*, July 1924, and *Harpers*, Aug. 1942.

²⁰⁷ The domain of free choice is sometimes denoted by the term *Heter*, as in the phrase *le-Heterah ha-Rishon*, i. e. to the original status of free choice, cf. Y. Yebamot I.1 (2a); sometimes by the term *Reshut* as in Sifra to Lev. 16.30, ed. Weiss, f. 83a, and M. Betsah V.3, for which cf. *supra*, pp. 136–137. Thus for example the rule is that the recitation of the *Ma'ariv* Prayer is a matter of free choice, *Tefilat Arabit Reshut*, Berakot 27b, cf. *Beth Joseph* to *Orah Hayyim* 275 beg., cf. also Y. Moed Katan, III.5 (82d).

no specific determination is made as to what the individual shall or shall not do. Yet he is not entirely free. In some instances the restraint is so great that it has the effect of positive law. In others it hardly exists. This is the domain of the obedience to the unenforceable.

He maintained and rightly so, that the greatness of a society is measured by the extent of this domain. Accepting Lord Moulton's happy maxim that "obedience to the unenforceable" is the keystone of ethics, we differ with him with respect to his interpretation of this moral criterion which is an acid test of a much wider area of moral behavior. Obedience to the unenforceable, then, would embrace obedience to the laws which one is able to circumvent by cunning or main force, obedience to laws which one could violate without being detected,²⁰⁸ obedience to the spirit as well as the letter of the law, obedience to moral principles which have no legal sanction, obedience to the humanitarian impulses of the heart, obedience to conscience, to a sense of justice and to a feeling for fair play, obedience to the unwritten law which all decent, honest, and honorable persons everywhere submit to as being right.

But obedience to the unenforceable does not rise spontaneously in the human breast. As a Greek philosopher remarked:²⁰⁹ "Of all the wild creatures, the child is the most intractable." Consequently the author of Proverbs instructed us:²¹⁰ "Train up a child in a way he should go, and even when he is old, he will not

²⁰⁸ Concerning one who sins in secret, cf. Ḥagigah 16a, Sotah 3a, and Yoma 86b, Zebahim 88b, and Seneca, *Moral Epistles*, 43.3.

²⁰⁹ Plato, *Laws*, VII.808 D.

²¹⁰ Prov. 22.6. This verse is strangely omitted in the Septuagint, and in the Vulgate it reads: *Proverbium est: Adolescens juxta viam suam, etiam cum senuerit, non recedet ab ea*. Aristotle too observed that in order to be good, a man must have been properly educated and trained. *N. E.*, X.9.11 (1180a, 15). Plato observes: In infancy the whole character is determined by force of habit τὸ πᾶν ἦθος διὰ ἔθος (*Laws*, VII.792D). Similarly Aristotle noted that "Ethical virtue is the result of habit, and its name ethical is derived with a slight change in form, from *ethos* (habit)." *N. E.*, II.1.1. (1103a), 17. For character is habit long continued, καὶ γὰρ τὸ ἦθος ἔθος ἐστὶ πολυχρόνιον, cf. Plutarch, *On the Education of Children*, 2 F, ed. Loeb Classics, pp. 10–11, and Maimonides, *Ma'akalat Asurot*, 17.28.

depart from it." Now, the Torah is not only the source of morals, it is the moral educator of man, and a school for morals.²¹¹ Obedience to the unenforceable, therefore, can be inculcated by imbuing the minds of youth with good principles, such as ethical monotheism, the essence of which is the Decalogue. This was beautifully symbolized in the custom in temple times for the priest to recite the Decalogue and the *Shema*, which were regarded as containing the substance of the moral law.²¹² The question was even raised in ancient times, why the Torah did not begin with the Decalogue.²¹³ According to R. Levi, the *Shema* was recited daily because the Ten Commandments were implicit therein.²¹⁴ According to the rabbis, the Creator of all human beings, chose to reveal the Torah to the Jews only, because the ancient heathens refused the opportunity to accept the moral principles pertaining to the sanctity of life, marriage and property enjoined in the Decalogue, on the ground that they were incompatible with their own primitive tradition (*Yerushah*).²¹⁵

²¹¹ For the Torah as a pedagogue, cf. *Genesis Rabbah*, I.1.

²¹² Cf. *Berakot* 11b, Lieberman, *Hilkot Yerushalmi*, pp. 21–22, and *Orah Hayyim*, I.5 and Commentaries *ad loc.* Philo observed that the Decalogue contained the summary of the laws (κεφάλαια νόμων), *De Decalogo*, 29.154. The Decalogue and the *Shema* are found in the Nash papyrus, cf. Albright, *J. B. L.*, 1937, pp. 145–176, Cohon, *H. U. C. A.*, 26 (1955), 439. For the Decalogue in the Tefillin, cf. Haberman, in *Erets Yisrael*, in memory of Cassutto, vol. III, Jerusalem, 1954, pp. 174–177, and O. Bartholémy and J. T. Milik, *Discoveries in the Judaean desert*, I, Qumran Cave I, Oxford, 1955, pp. 72–73.

²¹³ *Mekilta*, ed. Horowitz, p. 219.

²¹⁴ Cf. *Y. Berakot* I.5 (3c). For the rule concerning standing during the public reading of the Decalogue, cf. *Responsa of Maimonides*, n. 46, ed. Freiman, pp. 46–47 and 359–361.

²¹⁵ *Mekilta*, ed. Horowitz, p. 221. According to R. Phineas, the Gentiles admitted that the spirit of the law of the Decalogue is morally superior to that of their own legislation, cf. *Numbers Rabbah*, VIII.4, and Bacher, *Agada Pal. Am.*, III, 319. Cf. also S. H. Butcher's chapter on "Greece and Israel" in his *Harvard Lectures on Greek Subjects*, London, 1904, pp. 1–43, Kenneth, Adam and Gwatkin, *Early Ideals of Righteousness, Hebrew, Greek, and Roman*, Edinburgh, 1910, and Benamozegh, *Morale juive et morale chrétienne, Examen comparatif suivi de quelques réflexions sur les principes de l'Islamisme*, Florence, 1895.

The test of the sincerity of man's belief in God is to be found in his adherence to the moral law of the Decalogue. Commenting upon the verse²¹⁶ "And he shall deal falsely with his neighbor" R. Hanina ben Hakinai said: "A man does not deal falsely with his neighbor unless he has previously denied God." Once R. Reuben was spending a Sabbath in Tiberias where he met a philosopher. When the latter plied him with the question "Who is the most despicable of men?" he replied "He who denies the existence of his creator." Whereupon he asked, "How is that?" To which he answered: "'Honor thy father and thy mother, thou shalt not murder, thou shalt not bear false witness against thy neighbor, thou shalt not covet.' A man does not violate these things, unless he has previously denied God, neither does a man commit any sin unless he first denied Him who prohibited it."²¹⁷

An early Judeo-Christian voiced the same sentiments in a different form:²¹⁸ "Thou believest that there is one God, Thou doest well; the devils also believe and tremble. But wilt thou know, O vain man, that faith without works is dead?"

A society in which obedience to the law is motivated merely by the fear of sanctions would scarcely rise above the jungle if it could exist at all. Obedience to the unenforceable which is the basis of every moral system and every good society may be best instilled by cultivating a reverence for God, (which is a synthesis of love and fear,²¹⁹) and a love for one's neighbor.²²⁰

²¹⁶ Lev. 5.21, cf. also Deut. Rabbah VI.14.

²¹⁷ Tosefta Shebuot III.6, pp. 449-450.

²¹⁸ James 2.17-20.

²¹⁹ This is Coleridge's definition of reverence.

²²⁰ Schechter remarks that the "Book of Leviticus first proclaims the principle of loving one's neighbor as one self which believers call Christianity, unbelievers Humanity . . . with a few exceptions our theologians still enlarge upon the 'Night of Legalism' from the darkness of which religion only emerges by a miracle supposed to have taken place about the year 30 of our era," cf. *Aspects of Rabbinic Theology*, p. 120 and pp. 116-117. In Greek thought, the doctrine that one should harm one's enemies and serve his friends was accepted as part of the fixed order of things, cf. Lamb's note to Lysias, *For the Soldier*, 20, ed. Loeb Classics, p. 193, note c; cf. also Cicero, *Tusculan Disputations*, III.29, 72-73.

This has already been foreshadowed in the pre-Christian Testament of the Twelve Patriarchs: "Love the Lord through all your life, and one another with a true heart."²²¹ As Alexander Pope, in his *Essay on Man*, expressed it,

And know where faith, law, morals, all began
All end, in love of God, and love of man.

These two moral sentiments, as motivations for obeying the moral law, were duly stressed by the rabbis. First when we read:²²² "Obey God's law out of love and out of fear. Out of love, for if you be tempted to hate,²²³ be aware that one who loves does not hate. Obey out of fear,²²⁴ for if you are minded to rebel, know that one who fears does not rebel." When R. Johanan ben Zaccai blessed his disciples that they fear heaven as much as they fear man, they exclaimed: "Only as much!" He replied: "would that it would be as much! For you know, when a man plans to sin, he says, I hope no one will see me."²²⁵ Yet one who complies with the moral law from pure motives of love, lives on a more exalted moral plane.²²⁶

Secondly, Hillel, considered his paraphrase of Lev. 19.18, "What is hateful unto thee, do not do unto thy neighbor," as the essence of the Torah, and the rest was merely commentary.²²⁷

²²¹ Testament of Daniel, 5.3, cf. also Testament of Issachar, 5.2.

²²² Y. Berakot IX.5, and I. Goldziher, "Die Gottesliebe in der Islamischen Theologie," *Der Islam*, IX (1919), 114-158.

²²³ For hatred can be implacable, cf. Shabbetai Cohen, to *Yoreh Deah*, 341.5.

²²⁴ A man should fear only God and not man, Deut. 1.17, cf. also the story of R. Samuel ben Sosarti, P. Baba Metsia II.5 (8c). Aristotle says, that it is the nature of the many to be amenable to fear, but not to a sense of honor, *N. E.*, X.9.3. (1179b, 13).

²²⁵ Berakot 28b.

²²⁶ Sotah 31a.

²²⁷ Shabbat 31a. Henry C. Lea has well observed: "We have fortunately inherited the noble ideals of the school of Hillel . . . We have accepted them in theory for well nigh two thousand years, yet only within a century or two has there been any serious effort to reduce them to practice, and that effort thus far has been more significant in its failures than its successes," cf. "Ethical Values in History" reprinted in *Minor Historical Writings*, Philadelphia, 1942, p. 59.

R. Akiba too, described the precept " 'to love one's neighbor as one's self' as the quintessence of the Torah."²²⁸ In other words, it is a fundamental motivation for conduct in civil society. The doctrine of the love of man followed as a corollary to the doctrine of the reverence for God.²²⁹ It seems that the rabbis were shy of conjoining expressly the doctrine of the reverence for God and the love of man²³⁰ as is found in the Testament of the XII Patriarchs. But it did appeal to the Judeo-Christians, for we read: "On these two commandments hang all the law and the prophets."²³¹ The rabbis felt that it would be giving equal honor, so to speak, to the Master and the servant.²³² Relevant to this

²²⁸ Y. Nedarim 9.4, Genesis Rabbah 24 end, pp. 236–237, cf. also David Luria, *ad loc.* Love of thy neighbor means: As thou dost not desire to be injured or deprived of your possessions, so do not these things unto thy fellow man, cf. *Abot diR. Nathan*, ed. Schechter, pp. 53 and 60. For he who loves his neighbor does not kill, steal or commit adultery, cf. Galat. 5.4, Rom. 13.8–10, James 2.8, Matt. 22.36.

According to R. Isaac Luria it is proper for a Jew before reciting the daily morning prayers to accept anew the Mitsvah of "Love thy neighbor as thyself" in order to practice it better, cf. Auerbach, *Ateret Zekenim* to Orah Hayyim I.2. In early Christian literature the golden rule was made part of natural law, thus Isidore of Seville remarks: *Ius naturale est, quod in lege et evangelio continetur, quo quisque iubetur alii facere, quod sibi vult fieri, et prohibetur alii inferre quod sibi nolit fieri.* Cf. *Etymologies*, V.2, and *Corpus Juris Canonici*, beginning. In the Middle Ages, Roman Law as the *Ius naturale* was considered by the Christians as divine in origin. Thus Azo remarks: *Ius naturale est quod natura, id est, ipse deus docuit omnia animalia*, cf. *Institutes*, I.2, and Maitland, *Bracton and Azo*, London, 1895, p. XXX.

²²⁹ Ben Azzai felt that since man was fashioned in the image of God, the love of man followed naturally as a divine command, cf. Y. Nedarim 9.4 and Genesis Rabbah 24 end.

²³⁰ Thus R. Simon Imsoni refrained from interpreting the Hebrew term "Eth" in the verse "Thou shalt fear the Lord thy God," Deut. 10.20, for God may not be equated with any one, cf. Pesahim 22b and *Yefeh Enayim*, *ad loc.* The Palestinian Talmud Berakot 9.5 as quoted by the Aruk (I.330, ed. Kohut) reads *Him and His Torah*, cf. Ratner to Berakot, p. 215 and Ginzberg, *A Commentary on the Palestinian Talmud*, I.31.

²³¹ Matt. 22.37–40, Mark 12.28–31, Luke 10.27–28, cf. also M. Smith, *Harvard Theological Review*, 48, p. 51.

²³² Baba Kamma 79b. The Cabalist Recanati noted the that numerical value of "Komoka" in Lev. 19.18 was equal to that of "Elohim," quoted by Baerman Ashkenazi in his commentary *Matnot Kehunah* to Genesis Rabbah 24 end.

point is the remark of a Galilean heretic who said: "I cry out against you, O ye Pharisees, for ye write in a bill of divorce the name of the ruler with the name of Moses." The name of the ruler was given, so to speak, equal honor with Moses.²³³

Hence the doctrine of the love of God alone found a place in the Liturgy which gives official expression to the doctrines of the Synagogue. The doctrine of the love of man formed part of the authentic but unofficial exposition of Judaism.²³⁴ The rabbis, discussing the moral attainments and shortcomings of the Jews living during the second Commonwealth,²³⁵ observed that the Jews then studied the Torah, observed the commandments and the tithes punctiliously, and carried themselves in the grand manner, but they loved money²³⁶ and loathed one another without rhyme or reason.

The ethics of Judaism relates to the individual, society, and the republic of humanity.²³⁷ For the individual it teaches that he shall pursue the good life²³⁸ which he can attain by obeying God's laws that are good.²³⁹ The basis of the good life has been stated by the prophet Micah:²⁴⁰

It has been told thee, O man, what is good,
And what the Lord doth require of thee,
Only to do justly, and to love mercy, and to walk humbly
with thy God.

²³³ Yadayim IV.8.

²³⁴ However in the chapter *Kinyan Torah*, R. Meir remarks that the true student of the Torah loves God and man. R. Eleazar ben Shammua remarks: Let the fear of thy teacher be like the fear of Heaven, Abot 4.15. Cf. also Tosafot Sanhedrin 63a s. v. כל and II Chron. 24.16.

²³⁵ Y. Yoma I. 38c. For the Romans, cf. Juvenal, *Satires*, I, 112-115.

²³⁶ For the love of money is the root of all evil, cf. 1 Tim. 6.10.

²³⁷ Abba Eban, *The Toynbee Heresy*, pp. 4-5.

²³⁸ Amos 5.4 and Prov. 2.20. Not life itself, but a good life, is chiefly to be desired, Plato, *Crito*, 48, cf. also Seneca, *Moral Epistles*, 99.1.

²³⁹ Ps. 119.39. Aristotle too, held that the purpose of law is to make man good, cf. Cairns, *Legal Philosophy from Plato to Hegel*, p. 96. Plato and Aristotle found the highest good in the duties of citizenship, which lost their *raison d'être* when the Greek state disappeared.

²⁴⁰ Micah 6.8.

Thomas Huxley who considered this passage as the perfect ideal of religion remarked that,²⁴¹ "In the eighth century B. C., in the heart of a world of idolatrous polytheists, the Hebrew prophets put forth a conception of religion, which appears to be as wonderful an inspiration of genius as the art of Pheidias²⁴² or the science of Aristotle."

When the sages extolled the ideal of the good life, as *Torah u-Ma'asim Tovim*,²⁴³ the pursuit of learning and good deeds, it was an expression of faith on their part that piety and goodness could survive education. For Seneca²⁴⁴ lamented the fact that "When learned men have appeared, good men have disappeared," *Postquam docti prodierunt, boni desunt*.

As realists, the rabbis realized that man should first look after his own good although they cautioned against overdoing it.²⁴⁵ For goodness is not goodness if it brings harm to the benefactor. It should be practiced with prudence.²⁴⁶ For this is no fool proof world, as the rabbis retorted to the Romans, in a sally worthy of Juvenal. "Shall God destroy the world because of fools?"²⁴⁷ This view is reflected also in the saying of Demosthenes²⁴⁸ that "Our purpose and our actions must invariably be just, yet we must be careful to see that they are attended with advantage." In other words, morals in a sense, are a form of discipline, by which a person learns to accept the conditions of life, while transforming them as much as possible in his own favor.²⁴⁹

²⁴¹ *Essays*, IV.161.

²⁴² In ancient times it was deemed a misfortune to die without seeing the art of Pheidias, cf. Epictetus, *Discourses*, I.6.23.

²⁴³ Berakot 32b, Shabbat 63b, Sotah 44a, Baba Metsia 84b and Lev. R. 30.12 and Tosafot, Baba Kamma 17a, s. v. Ela.

²⁴⁴ *Moral Epistles*, 95.13. Elsewhere Seneca says, "One who is not a good man (*vir bonus*) can nevertheless be a physician, or a pilot, or a scholar (*grammaticus*) — yes, just as well as he can be a cook, *Moral Epistles*, 87.17.

²⁴⁵ Baba Metsia 33a, cf. also *N. E.*, VI.8.4 (1142a, 1–11).

²⁴⁶ Ketubot 50a. Cf. G. H. Palmer, *The Nature of Goodness*, 1904.

²⁴⁷ M. Abodah Zarah 4.7.

²⁴⁸ Cf. M. Croiset, *Les Idées Morales dans l'éloquence politique de Démosthène*, Montpellier, 1874. Cf. also Demosthenes, *Letters*, I.9.

²⁴⁹ Santayana, *Powers and Dominations*, New York, 1951, p. 190.

The pursuit of the good life by banishing greed and performing acts of benevolence leads to the ideal development of the human soul. As Job put it:²⁵⁰ "For what is the hope of the godless (Ḥanef)²⁵¹ though he acquire gain, when God takes away his soul." This notion has been incorporated into the Gospels where we read: "What has a man profited if he shall gain the whole world and lose his own soul."²⁵²

The good person submits to the dictates of his conscience or to the humane impulses of his heart, as the Ancient Hebrews would say. After David cut off privily the skirt of Saul's robe he suffered pangs of conscience because of his innate sense of right, as Scripture puts it "David's heart smote him because he cut off Saul's skirt."²⁵³ The Greek term for conscience (συν-είδησις) which achieved significance in the time of the Stoics occurs rarely in Jewish Hellenistic literature.²⁵⁴ It is this moral sense or conscience that Darwin considered to be the most impressive distinction between animals and men.²⁵⁵ In the Scriptures, the principle of conscience was conceived to be a

²⁵⁰ Job 27.8.

²⁵¹ Enoch was described as Ḥanef, in the sense of one who was wavering in his piety, cf. Genesis Rabbah 25.1. For Ḥanif in Islam, cf. Nicholson, *Literary History of the Arabs*, p. 149, note 2. The Septuagint correctly rendered the term Ḥanef by ἁσεβής, whereas Jerome translated it as Hypocrite, and the Targum interpreted it as *delator*, i. e. informer. The Jews, having suffered much from informers during the Hadrianic persecutions, held no one in greater contempt than the informer, cf. *Hoshen Mishpat*, 388.9, Bialoblocki, *Encyclopedia Judaica*, V, 935-937. Among the Romans too, *delator* was a term of contempt, cf. Mommsen, *Le Droit Pénal Romain*, Paris, 1907, II, 54, note 3, and G. Bossière, *L'Accusation publique et les délateurs*, 1911. In Greco-Roman Egypt also, informing was considered an infamous profession, cf. Taubenschlag, "Il delatore e la sua responsabilità nel diritto dei papiri," *Studi Arancio-Ruiz*, I (1952), 501-507. For Ḥanef, cf. Stein, *Philo und der Midrasch*, Giessen, 1931, pp. 17-18.

²⁵² Matt. 16.26. A similar idea is found in Plato, *Republic*, IX.589D-E, cf. also Shorey's note in Loeb Classics ed., p. 404, note d.

²⁵³ I Sam. 24.4-5.

²⁵⁴ Wisdom 17.11 and 2 Maccabees 6.11; cf. also C. A. Pierce, *Conscience in the New Testament*, Chicago, 1955. For Philo, cf. W. Völker, *Fortschritt und Vollendung bei Philo*, Leipzig, 1938, pp. 95-105.

²⁵⁵ *Descent of Man*, p. 110.

moral impulse implanted in the heart of man rather than a sense of duty. This is clearly the opinion of Jeremiah as may be inferred from his famous saying: "I will write my law in their heart."²⁵⁶ In the Talmud, too, the term conscience is always represented by a circumlocution containing the word "heart."²⁵⁷

Curiously enough, the term for duty does not occur in the Hebrew Scriptures. It is introduced once in the King James' version of Eccl. 12.13: "For this is the whole duty of man." In the Talmud the nearest equivalents to duty are *Hobah*,^{257a} or

²⁵⁶ Jer. 31.33.

²⁵⁷ *Davar ha-masur le-lev*, cf. Baba Metsiah 58b and 62a, *Libo nokfo*, Berakot 7b, Niddah 12a, *Libo nokdeni*, Y. Kiddushin II.4 (26b) as well as the phrase *ha-Lev yode'a*, Sanhedrin 26a, cf. also R. West, *Conscience and Society*, 1942. and H. F. Stewart, in *Judaism and Christianity*, ed. H. Loewe, vol. II, 299-331. Arabic has no single term for conscience, but the thing is sometimes denoted by a paraphrase such as "Unrest of the heart." Conscience is also expressed by the term "*Sarir*" i. e., secret thoughts, by *Damir*, i. e., hidden thoughts, and by "*Batin*" i. e., inner thoughts. *Damir* corresponds to the Aramaic *Tamir* and thus we find the phrase *Temiri Liba* in Targum Ps. 44.22, cf. also *Hevyonay Liba* in Targum Eccl. 10.20. In medieval philosophical Hebrew, *Matspun* is the term for conscience which corresponds to the Arabic *Damir* or *Batin*. Thus Bahya writes that he found no book devoted to the *Ilm Al-Batin* which is rendered by the Hebrew translator *Hokmat ha-Matspun* which is the study of conscience, cf. *Al Hidaya*, p. 8, and Hebrew translation, ed. Suwalki, 1863, p. 13a. He thought the reason for this might be found in the fact that the duties of the heart were considered optional and only part of worldly wisdom (*Adab*, i. e., *Musar*). Bahya spoke of ethical precepts as being subject to man's conscience, (*Damir* i. e., *Matspun*) and known only to God, as Jeremiah (17.10) says: "I the Lord search the heart. I try the reins." (Arabic text, pp. 6-7, Hebrew translation, pp. 12a-b). In modern Hebrew conscience is denoted by the term *Musar Kelayot*. For the origin of the latter cf. Rashi to Berakot 61a, s. v. We-ha-Lev mevin. Cf. also Heinisch, *Theology of the Old Testament*, 1955, pp. 261-262.

^{257a} The rabbis distinguished between personal duties (*Hobat ha-Guf*) which were obligatory upon the Jew wherever he was situated and territorial duties (*Hobat Karka*) which were en vigueur only within the territory of Palestine. The rabbis adduced Deut. 21.1 as proof against the conceivable hypothesis that Jewish law was applicable only in Palestine, cf. Kiddushin 37a. Curiously enough, Spinoza strangely derived from Jer. 9.23 that the ceremonial law was not binding upon the Jew after the destruction of the kingdom, *Theological-Political Treatise*, ch. V (New York, Dover Publications, 1951, p. 72). The later authorities considered the prohibition of polygamy as personal and not

Mitsvah, or the verbs *Hayyav* or *Tsarik*. On the whole, the rabbis did not develop a notion of duty which would have implied to them some form of external compulsion. They held in disdain the hypocritical Pharisee who said: What is my duty and I shall do it?²⁵⁸ The rabbis frowned upon persons who merely said their prayers or studied Torah out of a sense of duty²⁵⁹ rather than from a spontaneous feeling of devotion to an ideal. The Jews felt that "the feeling of duty may have prevented much evil in this world, but the beautiful and the good, have never sprung from the feeling of duty, but from the living impulses of the heart."²⁶⁰

The pursuit of the good life²⁶¹ leads to true happiness, for if

territorial law, cf. *Eben ha-Ezer*, 1.10, *Beer Hetev*, note 23. In the same category was the law concerning one who is married for ten years without children, cf. *Eben ha-Ezer* 154, *Pitḥe Teshubah*, note 25. Cf. E. Pacelli, *La Personnalité et la Territorialité des Lois dans le Droit Canon*, 1945.

²⁵⁸ Sotah 22b and P. Berakot IX.7 (14b).

²⁵⁹ M. Berakot IV.4, Abot II.13 and Menaḥot 99b. Cf. also Titkin, *Die Lehre von den Tugenden und Pflichten bei Philo*, Bern, 1895, Z. Frankel, "Zur Ethik des jüdisch-alexandrinischen Philosophen Philo," *M. G. W. J.*, 16 (1867), 241–252, 281–297 and M. Wolff, "Die Philonische Ethik," in *Philosophische Monatshefte*, 15 (1879), 330–350. The Greek term for duty is *καθήκον*, and was first introduced by Zeno who wrote a treatise on the theme, see Diogenes Laertius, VII.25 and 108–109. The Latin equivalent used by Cicero is *officium*, cf. his *De Officiis*, I.3.8.

²⁶⁰ Paulsen, *System of Ethics*, p. 355. During the Middle Ages as well as in modern times the most popular ethical treatise was the *Duties of the Heart* by Baḥya ibn Pakuda.

²⁶¹ The rabbis state that "Tov" meaning the Good in Ps. 39.3 refers to the Torah, cf. Berakot 5a. Santayana is correct when he says that "Judaism and Christianity, like Greek philosophy, were singularly inspired by the pursuit of happiness, in whatever form it might be really attainable: now on earth if possible, or in the millennium, or in some abstracted and inward life, like that of the Stoics, or in the last resort, in a different life altogether beyond the grave. But heathenism ignores happiness, despises it, or thinks it impossible. The regimen and philosophy of Germany are inspired by this contempt for happiness, for one's own happiness as well as for other people's. Happiness seems to the German moralists something unheroic, an abdication before external things, a victory of the senses over the will. They think the pursuit of happiness low, materialistic, and selfish. They wish everybody to sacrifice or rather to forget happiness, and to do "deeds." Cf. *Egotism in German Philosophy*, London, s. a., pp. 151–152.

happiness is a form of activity as Aristotle maintained,²⁶² then the Psalmist would insist that it must assume the character of obedience to the moral law, as we read "Happy are they who are upright in the way, who walk in the law of God."²⁶³

As for society, Judaism teaches that it must be founded on the principles of humanism and social justice.²⁶⁴ Intrinsic to Judaism is the doctrine of Humanism, in the sense that man's happiness and perfectibility^{264a} are the supreme goals of Jewish morals,²⁶⁵ which are realizable only in a society governed by the moral principles of the Torah. But perfection must not be carried too far. As Tennyson depicted it:

Faultily faultless, icily regular, splendidly null,
Dead perfection, no more.

²⁶² *N. E.*, I.10.2. Cf. Zeller, *Aristotle and the Earlier Peripatetics*, New York, 1897, pp. 141 ff.

²⁶³ Ps. 119.1, cf. N. Wieder, "The Qumran Sectaries and the Karaites, *J. Q. R.* 47 (1956), 97-113, on the Perfect of Way in the Manual of Discipline.

²⁶⁴ Cf. Reinach, "Le Judaïsme Prophétique et les Espérances actuelles de l'Humanité," in *Acts et Conférences de la Société des Études Juives*, March 7, 1920, pp. IX-XXVII. In a similar sense "*Humanitas*" is defined by Seneca, *Moral Epistles*, 88.30, cf. also Kaminka, "Les Rapports entre le rabbinisme et la philosophie stoïcienne," *R. E. J.*, 82 (1926), 232-252. For *Humanitas* as a juridical motive in later Roman law, cf. Maschi, *Annali Triestini*, XVIII, 1949 and *Juridical Review*, 41 (1929), 205-219. For the Roman ladies who preferred the serene faith of Moses to the Philosophy of the Stoics, cf. Derenbourg, *Histoire de la Palestine*, p. 223.

^{264a} Cf. W. Völker, *Fortschritt und Vollendung bei Philo*, Leipzig, 1938, p. 260 ff.

²⁶⁵ Maimonides, *Guide des Égarés*, III.27. The spirit of humanism (*Gemilut Hasadim*) marks the beginning and the conclusion of the Torah, (Sotah 14a), cf. also Mendel Hirsch, *Humanism and Judaism*, 1928. According to R. Zera, the Book of Ruth is in the canon although it contains no ritual laws, but does teach the reward for humane dealings, cf. Midrash Rabbah to Ruth 1.8. The Jew recites daily the ancient prayer of Alenu, which contains a petition for the perfection of society (*Tikkun ha-Olam*) under the kingdom of the Almighty. Noteworthy is the concept of the medieval Jewish mystics concerning the perfection of the Divine Presence (*Tikkun ha-Shekinah*) as it were. This is a poetic way of saying that God fulfills Himself in Israel's observance of the Law, cf. Azulai, in his commentary *Nahal Kedumim* to Deut. 11.27.

Society was made for man, and not man for society.^{265a} This follows from the view that all men have a common origin belonging as they do, to the family of man.²⁶⁶ Although they differ in natural capacity, they do not lose their individual significance.²⁶⁷ Society is moulded largely by ideals and objectives of individuals of a predominantly mesomorphic character thwarting to persons low in mesomorphy.²⁶⁸ Nevertheless, the latter also have a right to assert their individuality. As the Mishnah puts it, "Every one should say for my sake the world was created."²⁶⁹ For a man null, Balzac informs us, is something frightful, but there is something worse, it is a man that is annulled.

As individuals we seem to believe in justice, but somehow as members of a group, we seize for ourselves whatever is within our power.²⁷⁰ For modern society consists of divergent, social, economic and political groups of different racial and religious strains, whose interests clash with one another, often ending in intolerance and bigotry as well as injustice. An admonition against racial bigotry is implied in Amos' immortal saying:²⁷¹ "Are ye not as the children of the Ethiopians unto me. O children of Israel, saith the Lord." Albeit the Hebrew prophets predicted the appearance of a universal religion in the *ultima aetas*,²⁷² yet until that time, Micah tells us:²⁷³ "Let all the nations walk each one in the name of his god, but we walk in the name of the Lord God, forever and ever."

^{265a} For the concept of *societas hominum* in the Roman writers, cf. Voigt, *Römische Rechtsgeschichte*, I (1892), p. 87, note 9. Cf. also Giercke, *Natural Law and the Theory of Society*, Boston, Beacon Press, 1957, p. XXI and pp. 75-76 and *passim*.

²⁶⁶ M. Sanhedrin IV.5.

²⁶⁷ Berakot 17a and 58a.

²⁶⁸ Charles Morris, *The Open Self*, 1948.

²⁶⁹ M. Sanhedrin IV.5.

²⁷⁰ Niebuhr, *Moral Man and Immoral Society*, p. 9.

²⁷¹ Amos 9.7.

²⁷² It was a firmly held belief that all peoples would accept God and the Mosaic law in the final days, cf. Sibyllines, III.767 and Klausner, *From Jesus to Paul*, p. 159. For the *Ultima aetas*, cf. Virgil, *Eclogues*. IV, 4.

²⁷³ Micah 4.5.

Scripture enjoins upon a Jew to honor all his fellow men, Jew and Gentile alike and treat them with fairness.²⁷⁴ As an example, the Palestinian Talmud cites the following incident.²⁷⁵ R. Simon ben Shetaḥ (circa 90 B. C. E.) was once presented with an ass which his disciples purchased for him from an Arab. They found upon the neck of the animal a precious jewel the proceeds of which they believed could relieve the master from his poverty.²⁷⁶ R. Simon refused to accept the gem upon learning that the Arab was unaware of the jewel when the animal was sold.²⁷⁷ "Do you think I am a barbarian?"²⁷⁸ said R. Simon, "I prefer to hear the heathen say,²⁷⁹ 'Praised be the Lord of the Jews' rather than gain all the treasures of this world." To commit fraud against a non-Jew is even a more serious moral offense,²⁸⁰ as it involves a desecration of the holy name of God, which is the gravest of sins.²⁸¹

²⁷⁴ Yoma 86a.

²⁷⁵ Y. Baba Metsia II.5 (8c) and parallel.

²⁷⁶ Cf. the view of Samuel, Baba Kamma 113b.

²⁷⁷ Cf. the view of R. Phineas ben Jair in Baba Kamma 113b and *Hoshen Mishpat*, 348, *Be'er ha-Golah*, note 5.

²⁷⁸ For Barbaros, cf. Taubenschlag, *The Law of Greco-Roman Egypt*, New York, I (1944), 4 n. 13, and Lieberman, *Talmud of Caesarea*, p. 16.

²⁷⁹ What the Roman law might be cannot be determined with certainty. It is true that consent is of course a necessary element in every contract of sale (Ulpian, D. 18.1.9. pr). Neither would an error with respect to the accessory vitiate the sale (Paulus, D.18.1.34. pr.). Yet in this case of the sale of the ass, the jewel cannot be classed as an accessory, and furthermore its existence was unknown to the vendor. For the Jewish law concerning the sale of accessories, cf. Baba Batra 77b. In Anglo-American law, with respect to the rights of a purchaser of an article containing objects of great value, where both parties were ignorant of the presence of the valuable object, the courts have decided that title to the latter does not pass to the purchaser inasmuch as sale is by the consent of the parties, cf. *American Law Reports Annotated*, second series, vol. IV (1949), 314-319.

²⁸⁰ Tosefta Baba Kamma X.15, cf. *Responsa* of R. Joseph Rosen, II, 118.

²⁸¹ Y. Nedarim III.14 (38b), for blasphemy against the Holy Ghost, cf. Matt. 12.31 and parallels. According to Abaye, one who studies Torah and lives an unethical life brings ignominy upon himself. To him is applicable the reproach: "In that men said of them, these are the people of the Lord, and are gone forth out of His land" (Ezek. 36.20). Rashi paraphrased it as follows: When distinguished persons sin and are punished by exile, the Gentiles say of them "Behold God's people whom He could not save from dispersion."

Society is judged by the actions of the majority of its members, just as the individual is judged by the majority of his deeds.²⁸² In fact, the moral principles which govern a society are best expressed in a manner in which it reacts to their infraction.²⁸³

The conflict between what "ought to be" and "what is expedient,"²⁸⁴ in society leads to a separation between ethics and politics,²⁸⁵ and creates a dual standard of morality.²⁸⁶ For this

Thus they inadvertently bring God's name into disrepute (Yoma 86a). Abaye shows his familiarity with the fact that Gentiles were arguing the reason for Israel being in exile. For the view of the Church Fathers concerning Israel in the Diaspora as a penalty for their sins, cf. Williams, *Adversus Judaeos*, Cambridge, 1935, pp. 183, 200, Blumenkranz, *Die Judenpredigt Augustins*, Basel, 1946, pp. 174-181, M. Simon, *Verus Israel*, Paris, 1948, pp. 119-120. For the statement in the Midrash that the Gentiles claim that they are the true Israel (Canticles Rabbah VII.3, ed. Vilna, p. 72) see Juster, *Les Juifs dans l'Empire Romain*, I.44, note 2, Ginzberg, *Legends*, V, 68, note 8, and M. Simon, *loc. cit.*, p. 104. For exile as the punishment of the Jews, cf. also Kisch, *Jews in Medieval Germany*, Chicago, 1949, p. 147, note 51.

²⁸² Kiddushin 39b.

²⁸³ Deut. 13.6 and Glotz, *La Solidarité de la Famille dans le droit Criminel en Grèce*, Paris, 1904, p. I. Curious is the French term "*personnalité morale*" to designate a juridical person or corporation, cf. L. Michoud, *Le Théorie de la Personnalité Morale*, Paris, 1932, 3rd ed., pp. 3-4.

²⁸⁴ Cf. Paul's statement: All things are lawful unto me, but all things are not expedient, 1 Cor. 6.12, cf. D. S. Robinson, *Political Ethics, An Application of Ethical Principles to Political Relations*, New York, 1935, and Goodhart, *English Law and the Moral Law*, 1955, p. 19. The term *Shurat ha-Din* sometimes designates the rule of expediency. For example, when the rabbis commented upon the verse: "And the people strove with Moses" (Ex. 17.2), they remarked as follows: "They passed over and disregarded the rule of expediency (*Ovru al Shurat ha-Din*). It is natural (*Derek Erets*) that when a man is indignant at the members of his family, he puts on an angry look at the least significant of them. But, these (Israelites) put on an angry look on the greatest of them (Moses), cf. Mekilta, ed. Horowitz, p. 173, and ed. Lauterbach, II.129.

²⁸⁵ Niebuhr, *Moral Man and Immoral Society*, p. 251. Cf. Thucydides, V.85 ff., and Beseler, *Beiträge zur Kritik der römischen Rechtsquellen*, IV (1920), 249. The term *moral personality* may be traced back to Pufendorf, cf. Giercke, *Natural Law and the Theory of Society*, p. 118.

²⁸⁶ Peretz in one of his satirical essays observed, that the most pious Jew possesses three *Shulhan Aruks*, one for the public domain, containing only prohibitions, another *Shulhan Aruk* for the *Carmelit*, (the semi-private domain), where he and his familiar friends travel with a heap of permits, and a

reason, "to the sensitive in spirit, society must always remain something of the jungle, which indeed it really is."²⁸⁷ This mood is reflected by the rabbis when they were contemplating the opportunism of the Romans: "Be cautious with those in authority, for they let not a man approach them, but for their own purpose, and they appear as friends when it is to their advantage, and stand not by a man in the hour of need."²⁸⁸ Ideally speaking, those who engage in public affairs, should do so for the sake of heaven.²⁸⁹

As for the Republic of humanity, Judaism teaches that all its citizens have one father and one God created them all.²⁹⁰ Philo, blending a Hebraic and Stoic conception, writes that the law, by beginning with the story of creation, implied that the world is in harmony with the law . . . and that the man who observes the law is constituted thereby a loyal citizen of the world.²⁹¹ Indeed, it was R. Simon ben Gamaliel²⁹² who maintained that the world rests upon three things, on Truth, Justice and Peace.²⁹³ Law must ever be a living instrument of justice in the society of nations as well as in individual nations. Duplicity and deceit in diplomacy make for an unstable world-order. Morals must invade and pervade international diplomacy. In Plato's universal state, Greeks are arrayed against non-Greeks in constant

third *Shulhan Aruk* for use at home, containing merely blank pages, with one general release from his vows, cf. *Collected Works* (Yiddish), vol. XII, New York, 1920, p. 94. Cf. also *Otsar ha-Sifrut*, vol. II, part I (Cracow, 1888), pp. 9-11.

²⁸⁷ Niebuhr, *Moral Man and Immoral Society*, p. 81. ²⁸⁸ Abot II.3.

²⁸⁹ Abot II.2. "Office will show a man," says Aristotle, "for in office one is brought into relation with others, and one becomes a member of the community" (*ἀρχὴ ἀνδρα δείξει*), cf. *N. E.*, V.1.16, 113a, 2.

²⁹⁰ Mal. 2.9. For God, the father of all, cf. Rosh ha-Shanah 19a and Seneca, *Moral Epistles*, 110.10.

²⁹¹ Cf. *De Opificio Mundi*, I.3, when Diogenes the Cynic was asked "whence he came," replied, "I am a citizen of the world" (Diogenes Laertius VI.63). For the notion of the unity of mankind and Alexander the Great, cf. Bell, *Egypt, From Alexander the Great to the Arab Conquest*, Oxford, 1948, p. 31, note 2.

²⁹² Abot I.17.

²⁹³ Cf. Gittin 59b, where it is stated that it is the object of all the laws of the Torah to secure peace, cf. also Tanḥuma, ed. Buber III, p. 16.

warfare; war is one of the necessary evils.²⁹⁴ But the Jewish nation did not glory in military prowess,²⁹⁵ it was quite content with its victories in the spiritual realm. It did live to witness a great and worthy portion of mankind adopt many of its thoughts, obey many of its precepts, and draw the line quite often between good and evil exactly where it had drawn it.²⁹⁶

It is a tiring truism by now to reiterate that man is facing his greatest challenge since the Paleolithic age. Since progress in morals, in the nature of things, does not keep pace with technological advance, there are grounds for fearing that the greater is the risk of physical and/or spiritual annihilation.²⁹⁷

The story of Paradise Lost narrated in Scripture is portentously relevant today. It is improbable that modern man will or can turn his back on the tree of knowledge of good and evil after he has tasted of its fruits. In very deed, man has not only a right to knowledge, it is his moral obligation to acquire all he can. Isaiah pictures the future as a time when the world will be filled with knowledge as waters fill the earth.²⁹⁸ Unlike Adam, man may yet pluck from the tree of life and thus insure a place in the sun for all mankind. For God said: "Neither will I again strike down every living thing as I have done."²⁹⁹ But the fulfillment of this promise is contingent upon man's behavior, since man is God's partner, as it were, in the work of creation.³⁰⁰ The

²⁹⁴ H. Wünsche, *Die Freude in den Schriften des alten Bundes*, p. 26, Weiss, *Griechisches Privatrecht*, 1923, p. 171, n. 18, and Caldwell, *Hellenic Conceptions of Peace*, New York, 1919, and B. Keil, *Eirené, Eine philologisch-Antiquarische Untersuchung*, Leipzig, 1916. For the Roman view, cf. Ihering, *Geist des römischen Rechts*, Leipzig, I (1878), pp. 246-247.

²⁹⁵ But they did show military valor, when it was necessary, cf. M. Bloch, "Les Vertus Militaires des Juifs," in *Actes et Conférences de la Société des Études Juives*, Jan. 30, 1897, pp. XVIII-LIII. Cf. Cassel, *Judengeschichte*, p. 73, note 28, who cites St. Ivo that *non est mirum, si apud Judaeos perierit omnis dignitatis bellatorum (Decretalis, 13.118)*.

²⁹⁶ Santayana, *Dominations and Powers*, p. 246.

²⁹⁷ Toynbee, *Study in History*, IX, 756-757 and 466.

²⁹⁸ Isa. 11.9, cf. also Hab. 2.14.

²⁹⁹ Gen. 8.21. Cf. also Ginzberg, *Legends*, V.394, note 22.

³⁰⁰ Shabbat 119b. Cf. also *Orah Hayyim*, 639, *Be'er Heteib*, note 1. Cf. Genesis Rabbah, I.10. I shall create the world under the most favorable

tree of knowledge of good and evil³⁰¹ is the symbol of science whereas the tree of life is a metaphor for wisdom. Note that the author of Proverbs, refers to wisdom "As a tree of life unto those who take hold of her, and those who support her are happy."³⁰² The Hebrews agreed with the Greeks that wisdom³⁰³ is "a combination of intelligence with knowledge" therefore, when wisdom accompanies knowledge, man may experience pleasantness upon this planet. "For when wisdom shall enter into thy heart, knowledge shall be pleasant unto thy soul."³⁰⁴ For never was there more knowledge in the world with respect to all matters that concern man and his physical well-being on this globe than there is today. The question is whether mankind, under the threat of mutual extinction presented by absolute weapons, has the foresight, the wisdom, and the will to heed the prophetic admonition to inaugurate a new international order resting upon law and justice, to reconcile science with ethics³⁰⁵ and to beat the atomic weapons into atomic plow-shares, and so attain unending peace.

In his novel *Tancred*^{305a} which Disraeli published in 1847, he auspices (*Bilshon Berakah*), would that it would endure, cf. also Genesis Rabbah, III.8.

³⁰¹ There is but one thing that brings the soul to perfection, — the unalterable knowledge of good and evil, cf. Seneca, *Moral Epistles*, 88.28.

³⁰² Prov. 3.18, cf. Berakot 32b.

³⁰³ *N. E.*, VI.7.3, (1141a, 20).

³⁰⁴ Prov. 2.10. Cf. John Morley's observation, "In knowledge and methods of science each generation starts from the point at which its predecessor left off; but in the wisdom of life, in the maxims of good sense applied to public and private conduct there is, said Mill, a pretty nearly equal amount in all ages. *Studies in Literature*, London, 1904, p. 58.

³⁰⁵ "What we most need," said Samuel Butler, "is to reconcile both science and theology with sincerity and good breeding, to make our experts understand that they are nothing, if they are not single-minded and urbane. Get them to understand this, and there will be no difficulty about reconciling science and theology." One is here reminded of Comte's remarks, "Now that the human mind has grasped celestial and terrestrial physics — mechanical and chemical; organic physics, both vegetable and animal — there remains one science to fill up, the series of sciences of observation-social physics," *Positive Philosophy*, trans. by Martineau (American ed.), p. 30. Cf. A. Edel, *Ethical Judgment. The Use of Science in Ethics*, New York, 1955.

^{305a} For the name Tancred, cf. Zunz, *Zur Geschichte und Literatur*, p. 486 and Yvonne Bongert, *Les Cours Laïques du X^e au XIV^e Siecle*, Paris, 1949, p. 160.

put into the mouth of Tancred the following colloquy. Tancred tells Eva that her race must come to the rescue of unhappy Europe. "Send forth a great thought, as you have done before, from Mount Sinai,^{305b} from the villages of Galilee, from the deserts of Arabia, and you may again remodel all their institutions, change their principles of actions, and breathe a new spirit into the whole scope of their existence." Eva objects: "No, no, it is impossible. Europe is too proud, with its new command over nature, to listen even to prophets. Leveling mountains, riding without horses, sailing without winds, how can these men believe that there is any power, human or divine, superior to themselves."

But Tancred assures her that "Europe is not happy. Amid its false excitements, its bustling inventions, and its endless toil, a profound melancholy broods over its spirit and gnaws at its heart. In vain, they baptise their tumult by the name of progress; the whisper of a demon is ever asking them 'Progress, from whence to what?' . . . Europe, that part of the globe to which God has never spoken, Europe is without consolation."

Neither Europe nor the rest of the world need be without consolation if it would take to heart the great thoughts sent forth from Mount Sinai, and the exalted teachings of the Hebrew prophets of yore.

It is true that in the cosmos³⁰⁶ and in the world of men, conflict is part and parcel of the essence of life and the flux of existence, and natural inequality reigns supreme. However, the Hebrew lawgiver and prophets made bold to prescribe that man should defy nature³⁰⁷ and his own nature,³⁰⁸ as it were, by loving his

^{305b} Cf. Greta Hort, "Musil, Madian, and the Mountain of the Law," in *Jewish Studies in Honor of Gustav Sicher*, Prague, 1955, pp. 81-93.

³⁰⁶ For the Hebrew equivalent *Sidduro shel Olam*, cf. Genesis Rabbah, 12.1 and my "Peculium in Jewish and Roman Law," *op. cit.*, XX (1951), p. 152, note 89.

³⁰⁷ Law is the tyrant of mankind and often forces man to do many things contrary to nature, cf. Plato, *Protagoras*, 337C and Xenophon, *Cyropaedia*, I.6.31.

³⁰⁸ Man's reason has been made to regard as reprehensible things which he

fellow man as himself, that society should protect the poor and the infirm, and that the nations of the world should abolish war once and for all and thus do away with the law of the jungle. Forsooth, the ancient thoughts expressed on Sinai are as pertinent to our times as on the day they were uttered.³⁰⁹

"The unchangeable unwritten code of heaven
This is not of today or yesterday
But lives forever."³¹⁰

desires by nature. They include such matters as adultery, stealing, boasting, the satisfaction of one's thirst for vengeance by murder and the like, cf. Saadia, *Emunot we-Deot*, IX.1 (tr. Rosenblatt, p. 325).

³⁰⁹ Cf. Berakot 63b where it is said: "The Torah is as inspiring to those who study it continually as it was on the day it was given on Sinai. Cf. *Yefeh Enayim*, *ad loc.*, and Sifre Deut. 33 and 58 (ed. Finkelstein, pp. 59 and 124), and Rashi to Deut. 26.16. Note also Chajes, "Il Decalogo e esso in realta la base della civiltà europea?" *Il Messaggero Israelitico*, II (1915), no. 6, p. 5.

³¹⁰ These words from Sophocles, *Antigone*, 460–461, are equally Hellenic and Hebraic in spirit, cf. Hirzel, *Agraphos Nomos*, Leipzig, 1900, p. 24, note 1.

APPENDIX ON CIVIL MARRIAGE

The problem of the validity of civil marriage and the necessity of a *Get* to terminate such a connection has been vexing the minds of legal authorities for a long time.

In the following we touch upon the development of various kinds of extra-legal marriage relationships which served as a basis for comparison for the rabbis in their discussion of our problem.

In post-Talmudic times we find four types of marriage not recognized by Jewish Law entered into by Jews. 1. The *Pilegsh*. The institution of concubinage seems not to have existed in Talmudic times as there are no references to any actual cases. The opinions expressed by the rabbis on the subject are merely of an historical nature. The matrimonial adventures of Rab and R. Nahman reported in Yoma 18b and Yebamot 37b were not in the nature of a concubinal marriage as Strashun maintains. First, the term יחודי is never used in the Talmud to indicate such an alliance. It first appears in that sense in post-Talmudic times, e. g., Samuel ben Meir to Deut. 23.18, R. Nissim, Responsa no. 68 and the others. In Kiddushin 6a לי מהו refers to a regular marriage. Maimonides has correctly explained it as a case of temporary marriage which Jewish law permits, cf. *Issure Biah* 21.28 ואם הודיעה בתחילה . . . ודעתו לגרשה . . . שהוא נושא אותה לימים מותר, cf. also the discussion of the *Mishneh le-Meleh*, *ad loc.*, and *Tur*, *Eben ha-Ezer*, 2, end. Temporary marriages for a day, a month, or a year or any other specified term were recognized by the ancient Arabs and several other peoples as legal marriages, cf. *Encyclopedia of Islam*, s. v. "Muta," III. 774–76, 914, Westermarck, *The Future of Marriage in Western Civilization*, London, 1936, pp. 117–118, P. Vinogradoff, *Outlines of Historical Jurisprudence*, I, 247 ff., and Goldziher, *Vorlesungen über den Islam*, 1925, pp. 228–229.

Now in Post-Talmudic times, especially since the twelfth and thirteenth centuries, the institution of concubinage was revived among the Jews. Social and psychological inadequacies in family life as well as the example of the contemporary Christian environment contributed to this phenomenon.

Maimonides (*Melakim* IV.4) states that only a king is permitted to take a concubine but not a commoner. According to him this rule is implied in Deut. 23.18 (cf. his *Sefer ha-Mitsvot*, negative precepts no. 335, ed. Heller, p. 134). This view was shared by R. Samuel ben Meir, (cf. his commentary *ad loc.*). However, other eminent halakists were strenuously opposed to this opinion such as R. Abraham b. David of Posquieres (cf. his glosses to *Ishut* 1.4), Nahmanides (Responsa ascribed to him no. 284 and quoted in צדה לדרך III.1, 2 ed. Warsaw, 1880, p. 136, cf. R. Jonah Gerondi in שערי חסובה, *Kesef Mishneh* to *Ishut* I.4, and in Luria, ים של שלמה to Yebamot II.13), and R. Nissim (Responsa, no. 68). At best, the authorities tolerated concubinage when they were unable to suppress it. There were two kinds of concubinage practiced during the Middle Ages. In one form there was a regular betrothal but it was not followed by *Huppah*, in such a case a *Get* was required. When no *kiddushin* preceded this martial relationship then a rabbinical divorce could be dispensed with, cf. R. Asher, Responsa 32.1 and Epstein, "The Institution of Concubinage Among the Jews," in the *Proceedings of the American Academy for Jewish Research*, VI, 153–188, cf. also his *Marriage Laws in the Bible and the Talmud*, 1942, pp. 34–76. In addition to the responsa discussed by him, other early authors who deal with the problem are mentioned in *Keneset ha-Gedolah*, *Eben ha-Ezer* 26.1.

Secondly there was the problem of ecclesiastical marriage resorted to chiefly by the Marranos. R. Isaac ben Sheshet in his responsum no. 6, considered such a marriage invalid and required no *Get*, since cohabitation was not לשום קדושין as is demanded by the law (cf. Tosefta, Kiddushin I.3, Gittin 81a). Rashi remarks that he must say before witnesses הרניי בועל לשם קדושין, cf. also Maimonides, *Ishut* III.5, R. Joseph Rosin, *ad loc.*, David Friedman, פסקי הלכות, I, 2a, Warsaw, 1898. For the benediction, cf. Y. Berakot IX.3, and gloss of R. Nathanson,

ad loc., and Ratner, p. 212. In view of the fact that the contracting parties went through the ecclesiastical ceremony they indicated thereby that they intended living together as man and wife in disregard of Jewish law and hence their marital status is that of a concubine where no *kiddushin* had taken place.

Thirdly is the question of common-law marriage. While the early responsa do not deal with actual cases of common-law marriage, there is an interesting pronouncement upon it by Joseph di Trani in his *Novellae on Kiddushin* (ed. Venice, 1645, 63a), where he says that if a man brought a woman into his house and lived with her a number of years, she is not considered his wife at all, although cohabitation is a recognized form of establishing the matrimonial relationship. This relationship is not legal because the husband did not inform witnesses that he intended to comply with the requirement of *kiddushin* through a particular act of cohabitation. Hence their marital relations are purely extra-legal. When di Trani says, שלא פירש בפני עדים, he is evidently following Maimonides, *Gerushin*, X.19. An actual case of common-law marriage that took place in 1874 is discussed by R. Isaac Elhanan Spector in his עין יצחק, Vilna, 1888, no. 47.

Fourthly, there is the existence of civil marriage. It is not accidental that the first cases of civil marriage among the Jews took place in Mohammedan lands. For in Muslim law, marriage is purely a civil act, without any religious ceremony, performed by the Hakim or Cadi in the presence of two male witnesses. In a responsum of R. Saadia Gaon there is the earliest reference to a marriage according to civil law, במנהג נרים. There the question was the status of the son of a married woman who was married to an apostate, cf. שערי צדק, Salonica, 1792, 8a, no. 54, Derenbourg, *Oeuvres Complètes*, IX, p. 88, no. 3 and Responsa of Elijah of Mizrahi, no. 47, ed. Jerusalem, 1938, 122b. For the case of a *Kohen* of Alexandria who married a divorcee בדיני נרים, see Responsa of Maimonides, ed. Freiman, no. 157, p. 154. The third case of civil marriage which is recorded, took place in Turkey in the first half of the sixteenth century (cf. Responsa Benjamin Zeeb, no. 112). We read of a man שהחזיק אשה בלא שדחזיק וקדושין ברשות שופט הארץ (p. 187b). The question was raised whether the relatives of such a man were required to mourn

over him at his demise in view of his grievous offense which made him liable to excommunication as long as he did not desert the woman or marry her according to Jewish law. The Rabbi considered the relationship between the couple as *בעילה זנות* inasmuch as no witnesses were present at the marriage. While R. Benjamin was not concerned with the problem of divorce, there can be no doubt that he would not have required a *Get*.

R. David ibn Zimra is the first to deal with the problem whether civil marriage can be terminated only by a *Get*, but the case that came before him was that of an apostate. He decided that no rabbinical divorce was necessary (cf. Responsa, ed. Sudzilkov, I.351).

The first scholar to discuss the question whether a *Get* was mandatory in a case of civil marriage entered into by a real Jew was R. Mordecai ha-Levi — a seventeenth-century rabbi (cf. Frumkin, *Toledot*, II (96–98) in his responsa *דרכי נועם*). It was a case where a man married a woman civilly and wrote a marriage contract *כיבין* (no. 36, 118c) or *קיבין* (no. 46, 136b). R. Mordecai decided that a civil marriage could not be recognized as valid in Jewish Law. He held with Maimonides that if a man wishes to establish a marriage relationship by means of cohabitation he must inform witnesses to this effect before the act. Otherwise even if there are witnesses that he lived with the woman as man and wife the relationship is considered as illegal (*דנתכזין לזנות*, 136c).

Secondly, a *Get* was unnecessary not only because the marriage is invalid but also because there is no presumption that he performed a religious act subsequently to legalize his marriage (*שמה לשום קדושין בעל*) because one who was bold enough to enter upon a civil marriage has shown that he defies Jewish Law (119d) and has no scruples about continuing to live with a woman in an illicit manner (138a). R. Mordecai also cites the decision of R. Isaac ben Sheshet with regard to the validity of an ecclesiastical ceremony which he considers as directly parallel to civil marriage.

In Western Europe civil marriage was first introduced in Holland in 1580 and in the seventeenth century it was permitted

in all of the Netherlands. In England it appeared in 1647 under Cromwell and in 1792 the French government adopted it as a law which has ever since been in force, cf. Friedberg, *Die Geschichte der Civilehe*.

It seems that in Western Europe civil marriage occurred first among the French Jews and then spread to the other European countries. Therefore the rabbis were confronted again with the problem of deciding what attitude to take toward it. It would require a monograph to present a historical and critical survey of the arguments of the authorities who favor or declare a *Get* unnecessary. We shall content ourselves with an enumeration of the most important modern authorities who have wrestled with the problem. Moses Schick, *Responsa*, Lemberg, 1884, no. 21; Kutno, *וכחורה יעשה*, 1897, no. 15; Schmelkes, *ביח יצחק*, Warsaw, 1898, no. 29; Karpeles, *אהל אברהם*, Munkacz, 1899, no. 103; Judelowitz, *ביח אב*, New York, 1920, vol. VII, no. 11; and Judah Don Yahya, *בכורי יהודה*, Lutsin, 1930, no. 3, pp. 117–125 (I owe this reference to Prof. S. Abramson), Hoffman, *מלמד להועיל*, Frankfort, 1932, III.20; Milkowsky, *אהלי אהרן*, Tel Aviv, 1936, vol. II, 50; J. Rosen, *צפנת פענח*, Warsaw, 1935, no. 26; Ben Uziel, *משפטי עזיאל*, Tel Aviv, 1938, II.59; Henkin, *פירוש איברה*, New York, 1936; Feder, *בירור הלכה*, London, and articles by H. F. Epstein and Henkin in *הפרדס*, vols. VII–VIII. Klein, *Proceedings of the Rabbinical Assembly*, V, 474–486, cf. also H. F. Epstein, *חשובה שלמה*, St. Louis, II, 1941, no. 17, and Freiman, *סדר קדושין ונשואין*, 1945, pp. 362–379, M. J. Breisch, *חלקת יעקב*, Jerusalem, 1951, no. 1, 1–6. Albert Szterenyi dealt with the problem from a Reform point of view in his *Die Civilehe vom juedische-gesetzlichen und historischen Standpunkte*, Budapest, 1883.